

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Eastern District of Washington, Southern Division.

Filed

FEB 5 - 1917

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FRANCIS A. GARRECHT, United States District
Attorney, Federal Building, Spokane, Washing-
ton,

Attorney for Plaintiff and Appellee,

and

H. J. SNIVELY, North Yakima, Washington,
Attorney for Defendant and Appellant.

*In the District Court of the United States for the
Eastern District of Washington, Southern Divi-
sion.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST SIDE IRRIGATION COMPANY, a Cor-
poration,

Defendant.

Amended Bill of Complaint.

To the Honorable Judge of the District Court of the
United States for the Eastern District of Wash-
ington, Sitting in Equity :

Comes now the United States of America by Oscar
Cain, United States Attorney, and E. W. Burr,
Special Assistant to the United States Attorney for
the Eastern District of Washington, and brings this
its amended bill of Complaint against the West Side
Irrigation Company, a corporation, and thereupon
plaintiff says :

I.

That this action is prosecuted at the request of the Secretary of the Interior and under the direction of the Attorney General of the United States.

II.

That during all the times herein mentioned the defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at the city of Ellensburg therein; that the said corporation was organized for the purpose herein set forth and by law is authorized to construct and operate works and distribution systems for the purpose of furnishing water for irrigation and other purposes to individual water users upon the line of its irrigation systems and adjacent thereto: that in pursuance of the purposes for which the defendant corporation was organized and in accordance with the powers thereby acquired, it has purchased, enlarged, constructed, and now operated a canal with distributing works and is the possessor of an extensive water right.

III.

That the plaintiff has availed itself of the provisions of an Act of the Legislature of the State of Washington entitled "An Act relative to the appropriation of waters of the State for irrigation purposes, granting the United States the right of exercising the power of eminent domain in acquiring lands, water and other property for rights of way, and for reservoir and other irrigation works, granting to the United States certain rights in state lands and waters of the State relating to water users associa-

tions, and declaring an emergency'' approved Mar. 4, 1905 (L. '05, p. 180), and as authorized thereby and in compliance therewith did, on the 10th day of May, 1905, file in the office of the Commissioner of Public Lands of the State of Washington a notice of the withdrawal of the then unappropriated waters of the Yakima River and its tributaries, which withdrawal has been maintained to the present time.

IV.

That a prerequisite to the construction of the Yakima project, certain conditions were imposed by the Secretary of the Interior, compliance with which was required for the adequate protection of the United States in its proposed work. Among said conditions was the settlement of the water rights of existing canal companies and water users lest the plaintiff be embroiled in litigation, and to the end that plaintiff might definitely ascertain the amounts of water which were subject to plaintiff's use and appropriation.

In pursuance to the conditions so imposed the defendant company did, on the 21st day of October, 1905, enter into a certain agreement, a copy of which instrument was annexed to the complaint herein, marked exhibit "A," by the terms of which agreement defendant company limited its right of appropriation from said Yakima River and its tributaries to eighty cubic feet of water per second of time from April to September inclusive, of each irrigation season thereafter and to 34 cubic feet of water per second of time in October of each year.

V.

That said agreement was conditioned upon the announcement by the Secretary of the Interior of his determination to construct storage and irrigation works under the Act of Congress approved June 17, 1902 (32 Stat. 388), entitled "An Act appropriating receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," such announcement to be made within two years thereafter. That said agreement was to become null and void in the event of his failure so to do. That in pursuance thereof and of said Act of Congress, the acting Secretary of the Interior did, on March 27, 1906, announce his determination to construct storage and irrigation works for the utilization of the waters of the Yakima River and its tributaries.

VI.

That the plaintiff consummated a purchase from the Washington Irrigation Company, a corporation, of that certain irrigation system known as the Sunny-side Canal together with the water rights of that corporation by deed dated June 23, 1906, and recorded in Vol. 47 of Deeds, page 586, records of Yakima County, Washington. That the said water rights so purchased amounted to a flow of water during the irrigation season equivalent to 1054 feet per second of time pursuant to appropriation made on February 22, 1890, and perfected by the exercise of due diligence in the beneficial use of said appropriated water supply.

VII.

That in pursuance of the aforesaid Act of Congress and acts amendatory thereof and supplementary thereto, and relying upon the said agreement of defendant, the plaintiff, through the United States reclamation service, has examined, surveyed, located and constructed at a cost of \$7,200, and has now in active operation, extensive irrigation works for the storage, diversion and distribution of waters for the reclamation of arid and semi-arid lands in Kittitas, Yakima and Benton counties and plaintiff has authorized the construction of the works for the storage, diversion and distribution of waters for the reclamation of arid and semi-arid lands in Kittitas, Yakima and Benton counties and plaintiff has authorized the construction of the works necessary for the full utilization of the waters withdrawn as aforesaid and is diligently constructing the same, all of which irrigation works will, when completed, comprise the Yakima project.

VIII.

That notwithstanding the conditions of said contract (exhibit "A") the defendant corporation has heretofore appropriated, diverted and used large quantities of water in excess of the amount to which it is entitled and thereby entailed great damage upon the plaintiff.

IX.

That the defendant threatens to and will unless restrained by this Court to divert, consume and use large quantities of water in excess of the amounts to

which it is entitled under said contract; that if such diversion shall continue, as plaintiff believes it will, great and irreparable damage will ensue unto the plaintiff in this:

That the Yakima River above the north line of township 12, north, range 19 east, during the low-water portion of the irrigation season of each year, which in normal years continues from and after about July 1, is fully in use for irrigation purposes and the said flow is, and since the aforesaid purchase from the Washington Irrigation Co., has been, insufficient to permit the diversion by plaintiff of the water to which it is entitled by virtue of the said purchase. That both plaintiff and defendant divert their respective supplies of water above the last described point. That the amount of water in the Yakima River above the said described point consists of natural flow supplemented during the said low-water season by water released by the plaintiff from its reservoirs constructed as aforesaid. That said excessive diversion by defendant during the low-water season directly contributes to the shortage in the natural flow available to plaintiff, and furthermore unlawfully diminishes the amount of stored water which plaintiff, in pursuance of section 2 of the said Act of the State Legislature is engaged, during each low-water season, in transmitting to persons and corporations with whom plaintiff has contracted for the delivery of stored water.

X.

That plaintiff can make, and under the aforesaid

withdrawal and authorization is engaged in making beneficial use of the normal waters of the natural flow existing in the river prior to the low-water season of each year, both by storage and by the delivery thereof to persons and corporations contracting and to contract with plaintiff. That plaintiff has contracted with purchasers for the delivery of stored and natural flow waters, and in particular with that certain public corporation known as the Kittitas Reclamation District by articles of agreement made and entered into the 18th day of January, 1913, whereby plaintiff has agreed to deliver from the natural flow of the Yakima River and from its storage reservoirs a sufficient water supply for the irrigation of 82,000 acres of land, more or less, in Kittitas County, Washington. That the price to be paid by said Kittitas Reclamation District and other purchasers was rendered less on account of plaintiff's reliance upon its title to the natural flow of the Yakima River and its tributaries and such price could not have been made but for plaintiff's title to such natural flow waters. That there are vast areas in the valley of the Yakima River of arid and semi-arid land incapable of producing satisfactory crops which will be rendered either permanently useless or of far less value unless plaintiff may, in pursuance of its rights as aforesaid, carry out its plan of disposing of the natural flow of the Yakima River in conjunction with waters stored in plaintiff's reservoirs constructed and to be constructed. That the cost of the reclamation of said areas would be prohibitive if plaintiff be deterred from supplementing stored waters by natural flow

and if the owners of such lands must purchase their entire supply of water from plaintiff's storage works on account of the use of such water prior to the low-water season by defendant and by others in similar manner, and that thereby the success of the Yakima Project and the reimbursement of plaintiff's reclamation fund would be jeopardized.

XI.

That the point in the Yakima River at which the defendant diverts and will continue to divert water as aforesaid is above the works of the plaintiff from which it supplies the water to the lands hereinabove referred to, by reason of which fact the plaintiff is unable to exercise any control of said water and cannot prevent the defendant from using save by an injunction of this Court. That defendant's stockholders are engaged in extending their irrigation areas by the use of water, unlawfully, and in derogation of plaintiff's rights, diverted by defendant as aforesaid, transfers of *of* land and water are being made from time to time and purchasers are obtaining water titles in good faith. That a multiplicity of suits can only be prevented by a present declaration of plaintiff's right to put to beneficial use within a reasonable time, as against defendant and its stockholders, the waters of the Yakima River unappropriated on aforesaid date of plaintiff's withdrawal, excepting in favor of defendant the aforesaid amounts named in exhibit "A" and such amounts only.

XII.

That the plaintiff is remediless at law and that no

plain, adequate or speedy remedy may be afforded save in a tribunal exercising chancery powers.

IN CONSIDERATION WHEREOF and forasmuch as plaintiff cannot have any adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why plaintiff should not have the relief prayed for, and make a full and adequate disclosure of all matters aforesaid and according to the best and utmost of its remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

MAY IT PLEASE YOUR HONOR to grant unto the plaintiff a writ of subpoena to said West Side Irrigation Company and to such others as may in the opinion of your Honor appear necessary for the hearing and determination of this case, commanding it on a day certain to appear in answer unto this amended bill of complaint and to abide and perform such order and decree in the premises as to the Court may seem proper and required by the principles of equity and good conscience.

And plaintiff prays that your Honor may grant a permanent injunction commanding the defendant, its officers, agents and employees to abstain from diverting, consuming, using or taking from the Yakima River from and after July 1st in each year, water in excess of the amounts to which it is entitled, as specified in exhibit "A"; and that your Honor furthermore grant a decree quieting the title of this plaintiff pending beneficial use by plaintiff of per-

sons contracting under it, as against defendant to the waters of the Yakima River in excess of the amounts specified in defendant's contract, exhibit "A" throughout the remaining part of each year.

OSCAR CAIN,

United States Attorney.

EDMUND J. FARLEY,

Assistant United States Attorney.

E. W. BURR,

Special Assistant to the United States Attorney.

[Endorsed]: Filed Sept. 26th, 1913. W. H. Hare,
Clerk. By Edwd. E. Cleaver, Deputy.

*In the District Court of the United States for
the Eastern District of Washington, Southern
Division.*

No. 228.

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,

Defendant.

Answer to Amended Bill of Complaint.

The answer of the West Side Irrigation Company, defendant, to the amended bill of complaint of the United States of America, complainant:

This defendant, saving and reserving to itself all manner of exceptions that may be had to the uncertainties and imperfections of the amended bill of

complaint, comes and answers thereto, or to so much thereof as it is advised is material to be answered, and says;

I.

Admits the allegations of paragraphs I and II of said bill.

II.

It says that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph III of said amended bill, and therefore requires strict proof of the same.

III.

It says that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph IV of said amended bill. That as a prerequisite to the construction of the Yakima project certain conditions were imposed by the Secretary of the Interior, and that among said conditions there was a settlement of water rights of existing canal companies and water users, and denies each any every other allegation contained in said paragraph IV, except it admits that certain of its officers executed the instrument set forth in said amended bill of complaint and marked exhibit "A."

IV.

It denies each and every allegation contained in paragraph V of said amended bill of complaint.

V.

It says that it has no knowledge or information sufficient to form a belief as to each and every of the allegations contained in paragraphs VI and VII of

said amended bill of complaint, and therefore requires proof of the same.

VI.

Answering paragraphs VIII, IX, X and XI of said amended bill of complaint, the defendant denies each and every allegation contained in said paragraphs.

FURTHER ANSWERING, this defendant says:

I.

That this defendant corporation is organized solely as an agency for the distribution and delivery of water to the holders of shares of stock in said corporation. That each and all of the shareholders of said corporation are the owners of agricultural land in the Kittitas valley, in Klickitat County, State of Washington, and the amounts of water to which said shareholders are entitled are ascertained and determined by the number of shares of stock which said shareholders own. That each shareholder holds and owns sufficient of said stock to entitle him to a sufficient quantity of water to irrigate the irrigable and agricultural lands of which he is the owner or in possession, and that said corporation was organized solely as an agency with the individual land owners might co-operate in the appropriation, delivery and distribution of water to their individual lands. That for many years prior to the year 1905 this defendant, acting as the incorporated agent of the individual land owners aforesaid, constructed a canal running from the Yakima River to, and adjacent to, their lands, and proceeded to appropriate the waters of the Yakima River for the cultivation and irrigation of

said lands. That from time to time thereafter, and with reasonable diligence, the irrigated and cultivated area of said lands was extended, and the diversion of the waters of said Yakima River was increased, and the water so diverted was applied to the beneficial irrigation of said lands. That at the time of the execution of the instrument set forth as exhibit "A" of the amended bill of complaint, and styled "agreement," the defendant and its shareholders were entitled to the use of sufficient water of the natural flow of the Yakima River, by reason of their appropriation, to irrigate all agricultural lands held and owned by the said shareholders. That the defendant in order to divert, carry and conserve all the water to which its shareholders were entitled, was at the time of the execution of the so-called agreement engaged in, and has since completed, certain betterments and enlargements of its canal, all of which work was done for the purpose of completing the appropriation and delivering to the lands of said shareholders the full amounts of water to which they were entitled from the flow of said Yakima River.

II.

That long prior to the time when the plaintiff had taken any steps or expended any sum for the building of its storage system, as alleged by it, the rights of the defendant in and to its appropriations for the natural flow of the Yakima River were completed, and of which plaintiff at all times had notice. That at the time of the execution of the so-called agreement of October 21, 1905, the officers of the defendant corporation so executed the same for the purpose of

limiting their rights, for the information of the agents and officers of the United States Reclamation Service, to the amount of water which was necessary for the irrigation of the agricultural lands of its shareholders. That said so-called agreement was not intended to be, and was not in fact, a relinquishment of any of the rights which the defendant or its shareholders had, and was not intended to be, and is not in fact, a transfer of any rights to the plaintiff or to its Reclamation Service.

That said agreement was not executed for the purpose of prejudicing the rights of the defendant to any water which was being beneficially applied to the irrigation of the lands of the defendant's shareholders or which had been appropriated for that purpose. That it was the intent of the officers of the defendant to place the amount of water which the defendant and its shareholders claimed to an amount which the agricultural lands of said shareholders required for their successful irrigation, and it was not the intention of the defendant or its stockholders, and it was not then and is not now their understanding of the terms of said agreement that the defendant and its stockholders should be deprived of the right to apply to their lands the full amount of water to which they were entitled. That in the schedule contained in said agreement no rule of measurement of the water was fixed, and the defendant's officers signed said contract with the understanding and agreement that the rule which defendant had theretofore employed in the measurement and delivery of water to the stockholders, should apply. That the defendant had no

knowledge and now has no knowledge as to the amount of water which it was necessary to divert from the Yakima River in order to supply the full amount of water to which its stockholders are entitled at the point of use, but the sole knowledge of defendant and its stockholders upon the points aforesaid was their custom and knowledge of measuring and applying the water at the point of use. That the officers and stockholders of said corporation were farmers and not skilled in the technical estimate or measurement of flowing waters, but had followed a rule and custom sufficient for their purposes and means. That according to their custom and knowledge, the water which was necessary to supply the stockholders was one inch of water per second of time, measured under a 5-inch pressure at the point of delivery to the land per acre.

That measured under such pressure and at such point of delivery, the amount of water stated in the schedule or contained in said agreement was sufficient to meet the requirements of the defendant and its stockholders, and for that purpose and with such understanding and construction of the contract, the defendant's officers executed the agreement.

And defendant further says that measured in the manner and at the points aforesaid, defendant has not been diverting or flowing through its canal any greater quantity than the amount fixed in said schedule, and that the discrepancy, if any, which exists between the amount fixed in said schedule and the amount diverted from the river is the amount lost

in carriage and by the different methods of measurement.

III.

And defendant further says that it was represented to it, and is so stated in said agreement, that the sole purpose of said agreement was to permit the United States Reclamation Service to deal with and handle stored water in the Yakima River during the low water season, and defendant says that it has never made any claim to nor does it now claim, nor has it ever diverted any stored water flowing in said stream, but that its appropriation is solely from the natural flow of said river, and that by reason of its appropriation it is entitled at all times to receive from the natural flow of the river the water which it diverts through its canal, and there has been at all times in said river a sufficient amount of the natural flow to supply the diversions of this defendant without injury or prejudice to the plaintiff.

And defendant further says that it was not its intention to abandon or relinquish any of the rights in the Yakima River to which it was entitled, which were necessary for the proper irrigation of the agricultural lands aforesaid, and it has never abandoned said rights, or by any act construed the agreement aforesaid other than as hereinbefore stated. That it has at all times since the execution of said agreement continued the diversion from the Yakima River of a sufficient amount to apply to the lands the full amount fixed in the schedule in said agreement, measured as aforesaid, and has repeatedly notified the officers and agents of the United States Reclamation

Service of its use and its intention to continue to use such amount of water.

And this defendant further says, that any attempt to construe said agreement so as to deprive the defendant of any amount to which it is otherwise justly entitled, or any claim of right so to do, is without consideration and is harsh, inequitable and unconscionable.

And the defendant, having made full answer to all the matters and things contained in the amended bill of complaint, prays that the said bill be dismissed and that the defendant may have decreed to it its reasonable costs in its behalf most wrongfully sustained.

BOGLE, GRAVES, MERRITT & BOGLE,
Solicitors for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington. Nov. 14, 1913. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

*In the District Court of the United States for
the Eastern District of Washington, Southern
Division.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE WEST SIDE IRRIGATION COMPANY, a
Corporation,
Defendant.

Replication to Answer of Defendant, The West Side Irrigation Company.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to ever maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

OSCAR CAIN,

United States Attorney.

E. C. MACDONALD,

Assistant United States Attorney.

E. W. BURR,

Special Assistant to the United States Attorney.

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington. August 9th, 1912. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

*In the District Court of the United States for
the Eastern District of Washington, Southern
Division.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATION COMPANY, a
Corporation,

Defendant.

Opinion.

FRANCIS A. GARRECHT, U. S. Atty.

E. W. BURR, Special Asst. to U. S. Atty.

BOGLE, GRAVES, MERRITT & BOGLE, for
Defendant.

RUDKIN, District Judge.

The West Side Irrigation Company was organized and created under the Laws of the Territory of Washington, on the 5th day of June, 1889, for the purpose of constructing ditches and flumes to convey water from the Yakima River to irrigate lands and water stock in the West Kittitas Valley, Kittitas County, Washington Territory. The original incorporators and stockholders were farmers owning lands under the line of the proposed canal, whose chief object was to obtain a supply of water to irrigate their farms, and for stock and domestic purposes. The corporation thus formed has no income and pays no dividends. Each stockholder is entitled

to divert and use the water conducted through the canal in proportion to the amount of his capital stock, and contributes to the expense of maintaining and repairing the canal in the like proportion. In other words, the corporation is a mere agency to construct, maintain, and repair the canal, and to conduct and distribute water through the same for the use and benefit of its stockholders. Construction work on the canal commenced immediately after the incorporation and was completed within a couple of years thereafter; but the ditch has been cleaned and repaired, and no doubt to some extent enlarged, since then. No measurements have ever been made or taken by the defendant company of the volume of water conducted through the canal; but it now claims that it requires four thousand inches of water, measured according to the system or module employed by it to properly irrigate the lands underlying the canal and owned by its stockholders. During the year 1905 the government had under contemplation the construction of storage reservoirs and irrigation works in the Yakima Valley under the Act of Congress of June 17, 1902 (32 Stat. 388), commonly known as the "Reclamation Act," and had withdrawn or appropriated all of the then unappropriated waters of the Yakima River and its tributaries under the Act of the Legislature of the State of Washington of March 4, 1905 (Laws 1905, p. 180), entitled, "An Act relative to the appropriation of waters of the State for irrigation purposes, granting the United States the right of exercising the power of eminent domain in acquiring

lands, water and other property for rights of way, and for reservoir and other irrigation works, granting to the United States certain rights in State lands and waters of the State relating to water-users' associations, and declaring an emergency." The Secretary of the Interior refused to approve the plan commonly known as "The Tieton and Sunnyside Projects," or to enter upon the construction of irrigation works or storage reservoirs in the Yakima Valley, except upon compliance with certain conditions, among which were the following:

"First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima River or any other body of water, for irrigation, power or any other purpose.

"Second. The determination of all suits now pending to prevent the diversion of water from the Yakima River to the Yakima Indian Reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

The attitude of the Government was explained to the water users of the Kittitas and Yakima Valleys by officers or representatives of the Reclamation Service, and local committees were appointed to obtain a satisfactory settlement and adjustment of all claims to water from the Yakima River and its tributaries to meet the demands and requirements of the

Secretary of the Interior. At the instance of one of these committees the defendant company signed the following agreement:

“The West Side Irrigating Company, to PUBLIC
Between the Appropriator Taking Water from
the Yakima River and Its Tributaries.

WHEREAS, The Reclamation Service of the United States has been requested to investigate the water resources of the Yakima Water Shed with a view to the further development and increase of irrigation therein, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that in all the low water flow of the Yakima River and its tributaries has been appropriated and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled be first definitely ascertained and agreed to, and whereas, the undersigned claim certain quantities of water from the Yakima River and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

SCHEDULE.

| Cubic Feet per Second. | | |
|-------------------------------|------------|----------|
| April to August Inclusive. | September. | October. |
| 80 | 80 | 34 |

Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to, limit and does limit its respective rights of appropriation from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agreements of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima River and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has

caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

THE WEST SIDE IRRIGATION COM-
PANY.

By MITCHELL STEVENS,
Vice-President."

The determination to construct storage and irrigation works in the Yakima Valley was announced soon after the execution of the above agreement, and well within the two years specified, and the government has expended upwards of eight million dollars in the construction and maintenance of such works since that time. The present suit was instituted to restrain the defendant from diverting water from the Yakima River in excess of the quantity set forth in this so-called limiting agreement, and the case is now before the Court for final hearing on testimony taken before a commissioner appointed for that purpose. It is conceded throughout the testimony that the defendant has diverted water from the river in excess of eighty cubic feet per second of time, and it asserts the right to do so upon three grounds; first, because the limiting agreement was *ultra vires* and void; second, because the water should be measured at the several points where it is diverted from the canal by the different stockholders or users, and not at the intake of the canal, or at least that such was the understanding of the defendant; and third, that the defendant at all times claimed the right to divert

and use four thousand inches of water measured according to the system or module adopted by it; that it was represented to the defendant that eighty cubic feet per second was the equivalent of the four thousand inches thus measured, while in truth and in fact the four thousand inches, as measured by the defendant, is the equivalent of upwards of ninety cubic feet per second; and it is claimed that the difference between the eighty cubic feet per second, measured at the intake, and the four thousand inches as measured by the defendant at the points of delivery to the different stockholders is 24.6 cubic feet per second. In other words, the defendant claims and asserts the right to divert from the river 104.6 cubic feet per second, while the Government claims that it is limited to 80 cubic feet per second.

1. The defense of *ultra vires*, or, more properly speaking, the defense that the execution of this limiting agreement was without the scope of authority of the officers who executed it and authorized its execution, cannot prevail at this time. In the first place, the authority of these officers is not directly challenged by the answer, and want of authority is a special defense which must be specially pleaded. But in any event, and regardless of the pleadings, all the stockholders had notice of the execution of the contract soon after it was signed and it then became their imperative duty to either abide by the contract or promptly disavow the unauthorized acts of the corporate officers and bring notice of such disavowal home to the Government.

But instead of so doing a called meeting of the stockholders was held on the 2d day of January, 1906, for the purpose of discussing and considering the contract, and after full discussion a motion was adopted "That no action be taken to relinquish any water at the present time." The corporation, its officers and stockholders maintained a discreet, if not an intentional silence, concerning this action for almost two years, and permitted the Government to proceed with its work and with its vast outlay of money in the belief that all water disputes had been settled and adjusted in accordance with its requirements. That the defendant and its stockholders, under those circumstances, should now be estopped to question the authority of the officers or the validity of the contract, does not, in my opinion, admit of question.

10 Cyc. 1076.

Indianapolis Rolling Mill v. St. Louis etc. Rd.,
120 U. S. 256.

Penn. Ry. Co. v. Keokuk & H. Bridge Co.,
131 U. S. 371, 381.

Construction Co. v. Fitzgerald, 137 U. S. 109.

Augusta, T. & G. R. Co. v. Kittle, 52 Fed. 63,
73.

2. The contention that the water should be measured at the many points where diverted from the canal for use of the stockholders, instead of at the intake of the canal where the water is diverted from the river, or that the officers and stockholders of the defendant could have so understood, does not impress me. The question of the settlement and adjustment of the conflicting claims to water from

the Yakima River and its tributaries was under discussion for months. As early as April 1st, 1905, the following motion was adopted at a meeting of the stockholders of the defendant company:

“Motion by W. A. Stevens, seconded by J. N. Burch, that the stockholders of the West Side Irrigation Co. make claim to the Government Reclamation Bureau to four thousand inches of the waters of the Yakima river, and the board of Trustees to notify Splawn and Ellison to make their claim to water to flow through the company's canal and in case they do not make their claim the board of trustees to claim a thousand inches for Splawn and Ellison.”

It may here be stated by way of explanation that the claims of Splawn and Ellison are in no wise connected with the present claim of the defendant company. The object and purpose of the Government was to ascertain and fix the quantity of water diverted from the river, not the quantity actually used for the purpose of irrigation. True, no doubt, some of the seepage water found its way back into the river, but that is equally true, though perhaps to a less extent of water actually used for irrigation. But the main point is, that the purpose of the Government was unquestionably to fix the amount of the diversion at the point of diversion. No man of average intelligence could *of* understood otherwise, and a reading of the record convinces me that the officers and stockholders of the defendant company measure up to that standard.

3. The eighty cubic feet per second is conceded to be the equivalent of four thousand inches measured under a four-inch pressure, and I feel that I am well within the record in stating that the latter unit has almost become the standard of measurement in the locality in question. Such is the unit prescribed, in numerous decrees of the courts of Kittitas County, extracts of which are appended to the Government's brief and not denied by the defendant. Furthermore, it was testified at the trial that the defendant's module of measurement was the same as that prescribed in one of these decrees. The officers and stockholders of this company are not as ignorant of the ways of the world and of water measurements as they now profess to be. They have lived in the midst of irrigation and have been surrounded by, if not actually involved in litigation over water rights for years. The company had its origin in litigation over the waters flowing in the tributaries of the Yakima River, and its records repeatedly refer to inches of water and other matters showing a general knowledge of water measurements. And, without discussing the subject further, I will only add that the record convinces me that the officers and stockholders of this company are fully competent to understand and appreciate their rights and abundantly able to protect them. Furthermore, the purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish

any rights it might have, and the Government was under no obligation to take up irrigation works in the Yakima Valley.

Both parties, however, had or claimed rights in the waters of the river, and they undertook for reasons satisfactory to themselves to compromise and settle their rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law. Such agreement should not be set aside except for cogent reasons, established by clear and convincing proof. I know that promises made in aid of public improvements are lightly made and lightly regarded, and are too often followed by repentance and repudiation; but this does not detract from their legal obligation or relieve courts of the necessity of enforcing them in a proper case.

For the reasons thus stated I am satisfied that the plaintiff is entitled to the relief prayed for in the complaint whenever the diversion of a greater quantity of water from the river will interfere with or prejudice the rights of the Government.

But as said in a recent case pending in this court:

“The Government, like an individual, can appropriate only so much water as it applies to beneficial uses and can only restrain a diversion which operates to its prejudice.”

In that case a diversion after the first of July of each year was restrained, the Court finding that prior to that time no prejudice would result to the Government. It may be that in exceptional years the date thus fixed will be too late; the decree should

be definite and certain and probably that date could be fixed upon arbitrarily, the Court reserving the right to modify the decree whenever exceptional circumstances require a modification. This question can be determined, however, when the final decree is submitted for the approval of the Court. Let a decree be prepared accordingly.

Filed January 31, 1916. W. H. Hare, Clerk. By E. E. Cleaver, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST SIDE IRRIGATION COMPANY, a Cor-
poration,

Defendant.

Decree.

This cause coming on regularly to be heard, plaintiff appearing by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and E. W. Burr, Esquire, Special Assistant Attorney, and Messrs. Bogle, Graves, Merritt & Bogle appearing for the defendant, and the testimony having been submitted and the case having been argued, and the Court now being fully advised, it is

CONSIDERED and ADJUDGED that the limiting agreement entered into between plaintiff and defendant on the 21st day of October, 1905, is valid and binding on said defendant; and it is

ORDERED, ADJUDGED and DECREED that the defendant be, and hereby is, perpetually enjoined from diverting water from the Yakima River into its canal in excess of eighty (80) cubic feet per second from and after July 1st to September 30th; and in excess of thirty-four (34) feet in October during each irrigation season; the said diverted waters to be measured as near to the headgate of defendant's canal as practicable, but below the diversion therefrom of the so-called Ellison and Splawn ditch in the West Half of the West Half, and near the East and West center line of Section Thirty-four (34), Township Nineteen (19) North, of Range Seventeen, E. W. M.

PROVIDED, however, that the Court reserves jurisdiction to modify this decree so as to prevent the diversion of water prior to the first day of July in any year when such modification is necessary to preserve the rights of the plaintiff, and whenever a diversion in excess of eighty (80) cubic feet per second prior to July first in any year will interfere with or prejudice the rights of plaintiff. It is further

ORDERED, ADJUDGED and DECREED that plaintiff have and recover its costs and disbursements herein incurred.

Done in open court this 19th day of February,
A. D. 1916.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed for Record in the U. S. District Court, Eastern Dist. of Washington. Feby. 21st, 1916. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

Entered in J. & D. Register, Vol. 1, page 127.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,
Complainant,
vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,
Defendant.

Petition on Appeal.

To the Honorable FRANK H. RUDKIN, District
Judge:

The above-named corporation, The West Side Irrigating Company, conceiving itself aggrieved by the decree made and entered in the above-entitled cause on the 21st day of February, 1916, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and it prays that this appeal

may be allowed and that a transcript of the evidence, record, all proceedings, papers and exhibits upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of August, A. D. 1916.

H. J. SNIVELY,
Attorney for the West Side Irrigating Company.

The foregoing claim of appeal is allowed.

Dated this 18th day of August, A. D. 1916.

FRANK H. RUDKIN,
District Judge.

Service admitted this 18th day of August, A. D. 1916.

FRANCIS A. GARRECHT,
United States District Attorney and Solicitor for
Complainant.

Filed in the U. S. District Court, Eastern District
of Washington. Aug. 18, 1916. Wm. H. Hare,
Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,
Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,
Defendant.

Assignment of Errors on Appeal.

Now, on the 17th day of August, 1916, came The West Side Irrigating Company, a corporation, by its solicitor, H. J. Snively, and says that the decree rendered and entered in said cause is erroneous and against the just rights of said The West Side Irrigating Company for the following reasons:

First. Because the Amended Complaint upon which said decree was rendered does not state or set forth any facts or equities entitling the complainant to any equitable relief.

Second. Because the complainant is not authorized by any act of Congress or any other lawful authority to maintain this suit or any suit of this character.

Third. Because the United States is not vested by law with any authority, nor is the Secretary of the Interior, nor the Attorney General of the United States, to maintain a suit of this character, the United States not being a party in interest and the benefits of said suit accruing entirely to private interests.

Fourth. That said suit was brought without any legally lawful authority and it was erroneous to enter any decree therein for that reason.

Fifth. That the record shows that the court was without jurisdiction of any kind or character to try, hear or determine this controversy, or enter any decree therein, other than a decree of dismissal for the reason that no property or other right of the

United States of America was involved in this suit and said United States of America is not vested with any authority, power or right to engage in litigation of this nature.

Sixth. Because the evidence showed that the officers of The West Side Irrigating Company had no authority to enter into the alleged agreement dated the 21st day of October, 1905, upon which the decree of the court in this case is founded.

Seventh. Because the evidence showed that the said alleged agreement upon which the decree in this cause is founded purporting to be entered into on the 21st day of October, 1905, was made without any authority upon the part of the said corporation and was without the powers of said corporation. The Articles of Incorporation of said corporation only authorized the said corporation to carry and distribute water and to in no manner sell or dispose of water, or own water. Said alleged agreement was therefore null and void.

Eighth. Because the evidence showed that said alleged agreement was not an agreement, had no mutuality, was without any consideration, and was unenforceable.

Ninth. Because the evidence showed that said alleged agreement was indefinite and uncertain and founded upon a mistake in this, to wit: The officers of The West Side Irrigating Company who executed the said alleged agreement believed that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of

water under the measurement in use by them; the evidence showed that they measured their water in a certain way by inches under pressure and they were informed by the engineers of the complainant, who had technical knowledge upon the subject, that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water according to the measurement of the said corporation in use at that time, and having no technical knowledge upon the subject, they accepted this statement of complainant's engineers, and instead of putting into said alleged agreement four thousand (4,000) inches of water under pressure, as used by said irrigating company at that time, eighty (80) cubic feet per second of time was inserted; the evidence showed that the said officers intended to reserve all of the water which had been provided for the use of the lands under said irrigating company's canal, which they knew to be four thousand (4,000) inches, as measured by the said company, under pressure; and the said officers only executed said alleged agreement upon the supposition that said eighty (80) cubic feet per second of time was equivalent to said four thousand (4,000) inches as measured by said company at that time under pressure, whereas, in truth and in fact, it is shown from the evidence that eighty (80) cubic feet is not the equivalent of four thousand (4,000) inches as measured by said company, but that ninety and four-tenths (90.4) cubic feet per second of time is the equivalent thereof.

Tenth. Because the evidence showed that the intention of the officers of the irrigating company was to release only that portion of the waters of the said river not required to irrigate the lands of the stockholders of said company, but that it was the intention of the said officers to reserve all of the water required for the full and complete irrigation of the lands of the stockholders of the said company. It is shown from the evidence and admitted facts in the case, that under the decree of the Court as rendered and entered in this cause that the said eighty (80) cubic feet of water is insufficient to fully irrigate the lands of the stockholders of the said company or to furnish the amount of water to which the said stockholders are entitled in virtue of their several appropriations and rights. That it was manifestly not the intention of the said officers and certainly not within their power or authority to release to the United States for the irrigation of other lands in which their stockholders are not interested, water required for the irrigation of said stockholders' lands.

Eleventh. That said alleged agreement does not provide a place for the measuring of said water, and the evidence showed that the said defendant corporation had no measuring apparatus at the place that it took water from the Yakima River, but that it measured the water through boxes placed in the service laterals along the ditch; those service laterals measured water by inches under pressure. That the evidence showed that it was never contemplated by any of the parties to said alleged agreement that the water taken from the river by said irrigating cor-

poration should be measured at the intake; that the evidence showed that the defendant corporation's canal for a long distance runs along the banks of the Yakima River through gravel, and that a large portion of said water runs back into the river before it reaches any of the distributing laterals. That when a full head of water is running in said canal, at least twenty (20) cubic feet per second of time of the said water runs back into the Yakima River, and never enters the distributing ditches of the defendant corporation; that thus, instead of getting even eighty (80) cubic feet of water per second of time, the defendant corporation actually gets only sixty (60) cubic feet or less, of water per second of time.

Twelfth. Because in view of the uncertainty of said alleged agreement as to the place of measurement and the evident intention of the parties as shown by the evidence and the mistake made in transposing the four thousand (4000) inches as measured by said corporation into eighty (80) cubic feet, even if said agreement otherwise would be regarded as valid by the Court, the equities of the case as shown by the evidence and record does not authorize or uphold any other decree than a decree providing for the actual distribution from the Yakima River of water sufficient for the irrigation of the lands of the said stockholders of said corporation; that no other decree would be just and that such a decree alone would carry out the intention of all the parties; that is to say, the decree, in the event of said alleged agreement being held valid otherwise should provide that there should be measured out to said corpora-

tion sufficient water to irrigate the lands of the stockholders thereof, to wit, about seven thousand (7000) acres of land, in the manner and quantity in which they had been using such water, and in which they contemplated using it and that over and above this any right to water out of the Yakima River is waived by said agreement. That it is an injustice to the stockholders of said corporation to be arbitrarily cut down in the use of water below their requirements.

Thirteenth. Because the evidence failed to show that the United States performed the conditions of said agreement.

Fourteenth. Because the evidence failed to show that the complainant had any right or claim against The West Side Irrigating Company.

Fifteenth. Because the evidence showed that the defendant corporation is only interested in the agency and that the real parties in interest in the water carried by said corporation are the owners of the land. That the use of said waters is appurtenant to said land. That the said corporation had no right to release any interest in said land; that said land is generally owned by husband and wife under the laws of the State of Washington; that the laws of the State of Washington covering the rights of husband and wife are known as community property laws, and section 5918 of Remington and Ballinger's Annotated Codes and Statutes of Washington is as follows:

“The husband has the management and control of the community real property, but he shall

not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 2410; 1 H. C. 1400.)”

and under said provision any conveyance of property not made by a wife and husband jointly is void according to the decisions of the Supreme Court of the State of Washington. That if said agreement is given effect, as it is by the decree complained of, the effect will be to transfer the interests of the wives of the owners of said community property in real estate in contravention to the above Statute.

Sixteenth. Because the evidence showed that the act of the Trustees and officers of the defendant corporation in signing the said alleged agreement was repudiated on the second day of January, 1906, and that at that time the United States Reclamation Service had not expended any money in virtue of said alleged agreement, or performed any of its conditions. That under the evidence the said alleged agreement was not even *prima facie* valid, but was invalid; that the Court erred in holding that notice

of its repudiation had to be given to the reclamation service. Said officers were agents only of the corporation and the Court erred in holding that the United States was entitled to treat said officers to act and bind the stockholders.

Seventeenth. Because the evidence showed that the alleged agreement, if properly construed by the learned District Judge, is inconstruable and should not be enforced in a court of equity.

Eighteenth. Because it is shown by the evidence that complainant is not entitled to any relief whatever in a court of equity.

Nineteenth. Because the evidence fails to show that the United States is injured or that any interest represented by it is injured by the defendant corporation under the quantity of water claimed by it from the Yakima River, or that the United States can put said water to a beneficial use.

Twentieth. Because the evidence showed that the complainant is in a court of equity, praying specific performance of an alleged agreement without showing any consideration therefor.

Twenty-first. Because the evidence failed to show that Mitchell Stevens, vice-president of The West Side Irrigating Company, had power to bind said company or that his act was in any manner authorized by said company.

Twenty-second. Because said alleged agreement was not executed under the seal of the said company by any authorized officer of said company, or by the authority of the stockholders thereof.

Twenty-third. Because the Court erred in hold-

ing that eighty (80) cubic feet per second is conceded to be the equivalent of four thousand (4000) inches as measured by the defendant corporation.

Twenty-fourth. Because the Court erred in finding from the evidence that the object in purpose of the Government was to ascertain and fix the quantity of water diverted from the river and not the quantity actually used for irrigation. All of the evidence taken together, in view of the surrounding conditions of the parties will show that in making this alleged agreement certainly the defendant corporation had in mind the quantity of water actually used for the purpose of irrigation and not the quantity diverted from the river.

WHEREFORE, The West Side Irrigating Company prays that said decree be reversed and that said court may be directed to enter a decree dismissing the Bill of Complaint or to modify the same to the end that the stockholders of said Irrigating Company shall be awarded the amount of water which they require for the full irrigation of all their lands under the canal of the said irrigating company.

H. J. SNIVELY,
Solicitor for The West Side Irrigating Company.

Service of the above Assignment of Errors on appeal accepted this 18th day of August, 1916.

FRANCIS A. GARRECHT,
United States District Attorney and Solicitor for
Appellee.

*In the District Court of the United States for
the Eastern District of Washington, Southern
Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,

Defendant.

Order of Court Fixing Amount of Bond on Appeal.

Upon application of the defendant and plaintiff on
appeal the bond on appeal in this case is hereby fixed
in the sum of two hundred dollars (\$200).

FRANK H. RUDKIN,

District Judge.

Filed in the U. S. District Court, Eastern District
of Washington. Aug. 18, 1916. Wm. H. Hare,
Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, Southern
Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, The West Side Irrigating Company, a corporation, as principal and Mitchell Stevens and J. H. Prater, both of Kittitas County, State of Washington, as sureties, are held and firmly bound unto the United States of America in the sum of two hundred dollars (\$200), lawful money of the United States, to be paid to the United States of America, jointly and severally, for which payment well and truly to be made, said principal and sureties, their respective and several successors, heirs and representatives, jointly and severally are held and firmly bound.

Sealed with our seals and dated this 17th day of August, A. D. 1916.

The condition of this obligation is such that, whereas the principal, The West Side Irrigating Company, a corporation, is aggrieved by a decree in the above-entitled cause entered on the 21st day of February, 1916, whereby the said The West Side Irrigating Company was perpetually enjoined from diverting water from the Yakima River into its canal in excess of eighty cubic feet per second from and after July 1st to September 30th and in excess of thirty-four cubic feet in October, during each irrigation season, and to pay the costs and disbursements herein incurred and as more fully specified in the petition on appeal;

And whereas, the said The West Side Irrigating Company, a corporation, is about to appeal from said

decree to the United States Circuit Court of Appeal for the Ninth Circuit.

Now, therefore, if said appellant shall cause said appeal to be duly entered in the United States Circuit Court of Appeals for the Ninth Circuit and shall duly prosecute said appeal to effect, and if it fails to make its plea good, without fraud or delay to answer all damages and costs than this obligation shall be void, otherwise to be in full force and effect.

Dated this 17th day of August, A. D. 1916.

THE WEST SIDE IRRIGATING COMPANY, a Corporation.

By H. J. SNIVELY,
Its Solicitor.

MITCHELL STEVENS,
J. H. PRATER,

Sureties.

County of Yakima,
State of Washington,
Eastern District of Washington,—ss.

Mitchell Stevens and J. H. Prater, being duly and severally sworn, each for himself and one not for the other, depose and say: That he is a citizen of said district and a resident of Kittitas County, State of Washington, and a freeholder therein; that he, the said Mitchell Stevens, is worth the sum of \$50,000 over and above all of his debts and liabilities in property exempt from execution, and that he, the said J. H. Prater, is worth the sum of \$15,000 over and above all of his debts and liabilities in property exempt from execution; and each for himself and one

not for the other further says, that he is not an attorney or counsel at law, clerk of the court, Sheriff or other officer of said court or any other court.

MITCHELL STEVENS.

J. H. PRATER.

Subscribed and sworn to before me this 17th day of August, A. D. 1916.

[Seal]

E. A. FERRIS,

Notary Public in and for the State of Washington,

Residing at North Yakima, Washington.

My Commission Expires December 7, 1917.

The foregoing bond is approved as to form and sufficiency of security and the manner of execution.

Dated this 18th day of August, A. D. 1916.

FRANK H. RUDKIN,

District Judge.

Service admitted this 18th day of August, A. D. 1916.

FRANCIS A. GARRECHT,

United States District Attorney and Solicitor for
Complainant.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 18, 1916. Wm. H. Hare, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

Citation on Appeal.

To the President of the United States, United States
of America, and to FRANCIS A. GARRECHT,
United States District Attorney for the State
of Washington, GREETINGS:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear in the United States Cir-
cuit Court for the Ninth Circuit to be held in the
city of San Francisco, in the State of California,
within thirty (30) days from the date of this writ
pursuant to an appeal filed in the clerk's office of
the District Court of the United States, for the East-
ern District of Washington, Southern Division,
wherein The West Side Irrigating Company, a cor-
poration, is plaintiff and you are defendant in error,
to show cause, if any there be, why judgment in the
said appeal mentioned should not be corrected and
speedy justice should not be done to the parties in
that behalf.

Witness the Honorable EDWARD DOUGLAS
WHITE, Chief Justice of the Supreme Court of the

United States of America, this 18th day of August,
A. D. 1916.

FRANK H. RUDKIN,
District Judge.

[Seal]

Attest: W. H. HARE,
Clerk.

I hereby, this 18th day of August, A. D. 1916, accept due and personal service of this citation, on behalf of the United States of America, appellee.

FRANCIS A. GARRECHT,
United States District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 18, 1916. Wm. H. Hare, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,
Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

**Order Extending Time to and Including October 17,
1916, to File Record, etc.**

This cause coming on for hearing upon the motion of claimant for an order to be entered herein enlarging and extending the time within which the clerk of this court may prepare, and the said The West

Side Irrigating Company, appellant, may file with the clerk of the Circuit Court of Appeals for the Ninth Circuit, to and including the 17th day of October, 1916, and it appearing to the Court that good and sufficient cause exists for so extending and enlarging the time within which such record may be filed and said cause may be docketed.

NOW, THEREFORE, it is by the Court ORDERED that the time allowed by law and the rules in such cases made and provided within which the clerk of this court is required to prepare, and the above named The West Side Irrigating Company, appellant, is required to file with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the record in this case and to docket this case in said Circuit Court of Appeals, shall be and the same is hereby extended to and including the 17th day of October, A. D. 1916.

Done in open court this 16th day of September, A. D. 1916.

FRANK H. RUDKIN,
District Judge.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

**Motion to Extend Time to and Including October 17,
1916, for Filing Record, etc.**

Comes now The West Side Irrigating Company, appellant, and moves the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, to extend the time for the preparation and filing of the record on appeal in this case to and including the 17th day of October, 1916.

This motion is based upon the affidavit hereto attached and the files in said cause.

H. J. SNIVELY,
Solicitor for The West Side Irrigating Company.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

Affidavit of H. J. Snively.

Eastern District of Washington,
Southern Division,
County of Yakima,—ss.

This day personally appeared before me, the undersigned notary public in and for said county

and state, H. J. Snively, who, having been first duly sworn, upon oath deposes and says: That he is the only attorney for the appellant, the West Side Irrigating Company, a corporation, in the above-entitled cause on appeal to the Circuit Court of Appeals, for the Ninth Circuit and that for the past several weeks he has been suffering with an infected foot, which has prevented him from studying the record in this case sufficiently to determine what was necessary upon appeal and has been delayed because thereof until the present time in preparing his praecipe for the clerk of the court and because thereof the record has not been completed; that thirty (30) days' additional time is necessary to complete the same.

H. J. SNIVELY,

Subscribed and sworn to before me this 15th day of September, A. D. 1916.

E. A. FERRIS,

Notary Public in and for the State of Washington,
Residing at North Yakima, Washington.

Filed in the U. S. District Court, Eastern District of Washington, Sep. 16, 1916. Wm. H. Hare, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

**Stipulation Re Transmission of Original Exhibits to
Appellate Court.**

It is hereby stipulated by and between the attorney for the plaintiff and the attorney for the defendant that all of the original exhibits in the above-entitled case may be sent to the Circuit Court of Appeals for the Ninth Circuit pending the appeal in said Circuit Court.

(Signed) FRANCIS A. GARRECHT,

Attorney for Plaintiff.

H. J. SNIVELY,

Attorney for Defendant.

[Endorsements]: Stipulation. Filed October 3, 1916. W. H. Hare, Clerk. By Edward E. Cleaver, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

**Order Directing Transmission of Original Exhibits
to Appellate Court.**

Upon the stipulation in this cause providing for the sending of the original exhibits as part of the original record being presented to the Court in open court, Francis A. Garrecht, attorney for the plaintiff and H. J. Snively, attorney for the defendant being present and each agreeing thereto in open court,—

IT IS ORDERED that the clerk of this court do send as part of the original record upon appeal all of the original exhibits upon file in this cause in this court, and that the same shall have all of the effect that the same would have if the same were duly copied and certified to by the clerk of this court as part of the records on appeal, and shall be, in every way, treated and deemed to be part of the record upon appeal in this case.

Done in open court this 3d day of October, A. D.
1916.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 3, 1916. Wm. H. Hare, Clerk. E. E. Cleaver, Deputy.

In the District Court of the United States, for the Eastern District of Washington, (Southern Division).

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

Praecipe for Transcript on Appeal of The West Side Irrigating Company.

To W. H. Hare, Clerk of the Above-entitled Court:

You will please prepare for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, on the appeal of The West Side Irrigating Company, appellant, in the above-entitled case, a certified transcript of the following papers now on file and of record in this case:

- 1st. Amended Complaint.
- 2d. Answer to Amended Complaint.
- 3d. Reply.
- 4th. Opinion of the Court.
- 5th. Decree.
- 6th. Petition for Appeal.
- 7th. Assignment of Errors.
- 8th. Order Fixing Bond.
- 9th. Bond on Appeal.

- 10th. Order Allowing Appeal.
- 11th. Citation on Appeal.
- 12th. Order Extending Time for Making Up Record.
- 13th. Evidence upon Which Decree was Rendered and Exhibits.
- 14th. Stipulation as to Exhibits.
- 15th. Order as to Exhibits.

H. J. SNIVELY,

Solicitor for The West Side Irrigating Company,
Appellant.

Filed in the U. S. District Court, Eastern District
of Washington. Sep. 13, 1916. Wm. H. Hare,
Clerk. E. E. Cleaver, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, (Southern
Division).*

No. 228.

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, W. H. Hare, Clerk of the District Court of the
United States in and for the Eastern District of
Washington, do hereby certify that the foregoing
typewritten pages constitute and are a full, true, cor-

rect and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the Clerk of said District Court, as called for by the defendant and appellant in its praecipe; and that the same constitute my return to the order of appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Circuit, lodged and filed in my office on the 18th day of August, 1916.

I further certify that I hereto attach and herewith transmit the original Citation issued in said cause.

I further certify that I hereto attach and herewith transmit the original exhibits introduced in said cause, being plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O" and "P," and Defendant's Exhibits 1, 2, 3 and 4.

I further certify that the fees of the Clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of seventeen dollars and seventy-five cents (\$17.75), and that the same has been paid in full by H. J. Snively, attorney for the defendant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Eastern District of Washington, at Spokane, Washington, this 6th day of October, A. D. 1916.

[Seal]

W. H. HARE,
Clerk.

[2*] *In the District Court of the United States for
the Eastern District of Washington, Southern
Division.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY, a
Corporation,

Defendant.

Proceedings Had July 1, 1914.

To the Honorable FRANK H. RUDKIN, Judge of
the Above-entitled Court:

Pursuant to the order heretofore and on the 17th
day of September, 1913, made in the above-entitled
cause, referring said cause to me, as Special Exam-
iner, to take the testimony and proofs of the parties
and report the same to the Court, at 10 o'clock A. M.
the 1st day of July, 1914, in the Federal Building,
in the city of North Yakima, Washington, and
within said District, personally appeared before me
the plaintiff, by its solicitors, F. M. Garrecht, Esq.,
United States District Attorney for said District,
and E. W. Burr, Esq., Special Assistant United
States District Attorney, and the defendant, by its
solicitor, Carroll B. Graves, Esq., and thereupon tes-
timony and proofs were offered and proceedings had

*Page-number appearing at foot of page of original certified Tran-
script of Record.

from day to day and place to place to suit the convenience of witness and solicitors, as is more specifically stated in the report hereto annexed, as follows, to wit:

[3] IT IS STIPULATED: That the plaintiff pursuant to the act of the legislature of the State of Washington, approved March 4, 1905 (L. 1005, p. 180), did on the 10th day of May, 1905, file in the office of the commissioner of Public Lands of the State of Washington, a notice of withdrawal of the then unappropriated waters of the Yakima River and its tributaries; and in further compliance with the said act did file a certificate of the feasibility of the Yakima Reclamation Project on April 18, 1906. A supplemental notice of the withdrawal of the then unappropriated waters of the Yakima River on April 23, 1906. A certificate of the feasibility of the Yakima project supplementary to the foregoing named certificate on December 17, 1906; that on December 17, 1909, the Commissioner of Public Lands of the State of Washington pursuant to the aforesaid act granted an extension of the time of withdrawal of the waters of the Yakima River as aforesaid to February 20, 1913, that acting as aforesaid the said Commissioner of Public Lands on February 19, 1913, extended the said period of withdrawal to January 1, 1914, and that on December 22, 1913, the said commissioner extended the period aforesaid to January 1, 1916.

That the Secretary of the Interior, replying to Congressman W. L. Jones, declined by letter of

December 12, 1906, offered as Plaintiff's Exhibit "1," to adopt the said congressman's suggestion that the Yakima project be approved and certain requirements in advance of such approval be waived by the Secretary of the Interior.

[4] That on December 12, 1905, the Secretary of the Interior notified the director of the Geological Survey then in charge of the work of the Reclamation Service, laying down prerequisites identical with those above outlined, set forth in Plaintiff's Exhibit "1."

That there was then pending in this court a suit brought by the Prosser Falls Land & Power Company against the Washington Irrigation Company (which corporation subsequently and on June 23, 1906, conveyed to the United States its Sunnyside main canal) and against the agents of the United States in charge of the Yakima Indian Reservation in order to enjoin the defendants from diverting water to the prejudice of the said Prosser Falls Land & Power Company.

The owners of approximately fifty of the canals and ditches throughout Kittitas, Yakima and Benton counties, executed agreements relating to limiting the respective amounts of water claimed from the Yakima River by the respective parties, which instruments were in form identical with that attached as Plaintiff's Exhibit "A" to the original complaint in this action, except as to the amounts of water specified therein.

That copies of the limiting agreements aforesaid

were furnished to the Department of the Interior on March 15, 1906. Whereupon, on March 27, 1906, the Secretary expressly approved the Tieton and Sunnyside projects (being parts of the Yakima Project), and authorized the Director of the Geological Survey to proceed in the usual manner for the construction of the necessary works of the first sections of such project.

[5] That following the execution of said agreements of defendant and others and the dismissal of the litigations in this stipulation above referred to, the Secretary of the Interior has expended from the reclamation fund the following sums for building purposes; to and including May 31, 1913:

| | |
|--|-------------|
| Tieton | \$2,492,000 |
| Sunnyside .. | 2,351,000 |
| Pumping Lake Reservoir..... | 516,000 |
| Kachese Reservoir | 510,000 |
| Keechelus Reservoir | 282,000 |
| Cle Elum Reservoir..... | 104,000 |
| McAllister Meadows Reservoir.. | 12,000 |
| Reconnaissance Hydrographic Investigation | 17,000 |
| Wapato | 36,000 |
| Kittitas | 19,000 |
| Benton | 11,000 |

being a total for construction purposes of \$6,350,000. In addition thereto prior to May 31, 1913, there had been expended from the reclamation fund \$516,500 for operation and maintenance purposes.

That the expenditures aforesaid were made in point of time as follows:

| | | |
|------------------------|-----------|------------------|
| Prior to June 30, 1906 | 66,000 | From 5th Annual. |
| " " " " 1907 | 622,000 | " 6th " |
| " " " " 1908 | 1,263,000 | " 7th " |
| " " " " 1909 | 2,415,000 | " 8th " |
| " " " " 1910 | 3,669,000 | " 9th " |
| " " " " 1911 | 5,419,000 | " 10th " |
| " " " " 1912 | 6,423,000 | " 11th " |
| " " " " 1913 | 6,900,000 | Estimated |
| " " " " 1914 | 7,420,000 | " |

That in pursuance of the act of the state legislature aforesaid Secretary of the Interior on March 8th, 1909, authorized the director of the Reclamation Service to "construct under the provisions of the Reclamation Act such works as may be necessary for the full utilization of the [6] waters so withdrawn (referring to the withdrawal made as aforesaid under the act of March 4, 1905), using therefor the funds now available under allotments already made, and the funds to be made available from time to time in the future in accordance with the regular procedure established for that purpose."

That on September 2d and 3d, 1890, notice of appropriation in accordance with law was posted and filed for record in the office of the auditor of Yakima County by the agents of the Northern Pacific, Yakima & Kittitas Irrigation Company to the amount of 2000 cu. ft. per second of time. Thereafter by the agents of the company an amended notice of appropriation dated March 23, 1891, was duly made for 1000 cu. ft. per second of time. That thereafter by mesne conveyances the water appropriation so made, together with an appropriation initiated prior thereto by the Kennewick Ditch Company for 54 cu. ft. of water per

second of time passed to the Washington Irrigation Company.

That by deed dated June 23, 1906, the said Washington Irrigation Company conveyed both the said water rights to the plaintiff herein, said deed being recorded August 29, 1906, Vol. 47 of Deeds, at page 586, records of Yakima County.

That the said appropriation of 54 cubic feet per second on the part of the Kennewick Ditch Co. and that of the Washington Irrigation Co. for 1,000 cubic feet per second were, prior to the said transfer to the United States, consummated by beneficial use, the former water-right in the entirety and the latter to the extent of approximately [7] 650 cubic feet per second and by the irrigation of large bodies of irrigable land under canal of the Washington Irrigation Co. known as the Sunnyside Canal, appurtenant to approximately 40,000 acres of land.

That the United States in pursuance of the said deed of June 23, 1906, took the water-rights in question burdened by the express obligation to deliver water to the persons who had purchased from the predecessors of this plaintiff in the possession of the said Sunnyside main canal.

That as a part of the plan for settlement of the water-rights of the Yakima Valley as required by the Secretary of the Interior, it was by the said directory recommended that the water-right then proposed to be purchased from the said Washington Irrigation Co. should be limited from the appropriation of 1054 second-feet to 650 second-feet. That the said recommendation was adopted by letter to

the director of the Geological Survey dated March 27, 1906.

That following out the withdrawal of the waters aforesaid the United States has constructed irrigation systems for the beneficial use of water from 90,000 acres upon the Sunnyside unit and 34,500 acres upon the Tieton unit of the Yakima project and is engaged upon the construction of additional portions of the Sunnyside unit, which, when completed, will increase the area of said unit to 102,000 acres approximately. The United States has furthermore entered into a contract with the irrigation district known as the Kittitas Reclamation District and agreed upon certain conditions contained in said contract to furnish [8] water from the natural flow of the Yakima River from storage reservoirs constructed and to be constructed upon the headwaters of the Yakima River.

The total amount of land susceptible of being irrigated under the plan for the plaintiff's Yakima project will approximate 500,000 acres of land.

That the price of the aforesaid combined supply composed of both natural flow and stored water to the Kittitas Reclamation District was rendered less on account of the fact that the plaintiff conveyed water from the natural flow during the early irrigation, and prior to the low water period, thereby lessening the water required by the district from plaintiff's storage works. That thereby the price to the said district was reduced and the said project was rendered more economical and feasible.

That defendant has its point of diversion above

the points of diversion for the plaintiff's Sunnyside and Wapato canals.

That the water in the Yakima River at the time of the approval of the Yakima project as aforesaid and as early as 1903 was fully appropriated during the so-called low water season, which, in normal years, began on or about July 1 and extended to September 30 approximately in each year.

That defendant has diverted, is diverting and unless restrained by the Court will continue to divert water from the Yakima River in excess of 80 cubic feet per second.

That the plaintiff is able and plans to make use of the natural flow existing in the Yakima River during normal years, except during periods of exceptional and [9] brief high water subsequent in each year to May 1. That the amount of stored water which plaintiff is able to secure from its Bumping Lake and Kachees reservoirs already constructed, from its Keechelus reservoir now under construction and from its proposed Cle Elum and McAllister's Meadows reservoirs is 1,082,000 acre-feet from which an estimated annual draft of 1,000,000 acre-feet can be made, and in order to irrigate the aforesaid area of 500,000 acres the plaintiff plans to utilize from the natural flow of the Yakima river prior to July 1 in each year 1,000,000 acre-feet from the natural flow of the Yakima river and its tributaries.

Defendant reserves the right to except to any of the aforesaid admitted facts upon the ground of their immateriality or irrelevancy.

IT IS STIPULATED, that the papers annexed to the certificate of Mrs. Bean, acting clerk of the U. S. R. S., date October 3, 1913, be received in evidence and marked as Plaintiff's Exhibit "A," and returned and filed herewith.

Mr. BURR.—I would like to offer a map of the Defendant Company's canal line for the information of the Court, if you are willing to stipulate to its substantial accuracy.

Mr. GRAVES.—It may go in by agreement.

Map referred to offered and received in evidence, without objection, marked as Plaintiff's Exhibit "B" and returned and filed herewith.

Testimony of C. K. Tiffany, for Plaintiff.

[10] C. K. TIFFANY, produced as a witness for plaintiff, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Tiffany, will you state your experience in irrigation matters, very briefly?

A. I have been connected with the operation and the management of the Sunnyside Canal since 1901, in the capacities of engineer, superintendent of irrigation and project manager.

Q. Was part of that experience prior to the taking over of the Sunnyside project by the United States?

A. It was. I was employed by the Washington Irrigation Company from the years 1901 to 1906, inclusive.

Q. What work are you in charge of for the Government at the present time?

A. I am in charge of the operation and the management of the Sunnyside and Tieton canals.

(Testimony of C. K. Tiffany.)

Q. Are you an actual land owner, Mr. Tiffany, of irrigated lands? A. I am.

Q. Ever do any irrigating yourself?

A. I have done some.

Mr. Tiffany, will you state the conditions as to the available supply of water in the Yakima River subsequent to 1903, say, at and in the neighborhood of the Sunnyside main canal.

A. In 1905 and 6 I remember particularly the Sunnyside Canal was diverting practically the entire flow of the Yakima River at that point.

Q. That was not during the entire irrigation season?

[11] A. That was during the time of low water flow.

Q. How would you figure low water flow, Mr. Tiffany?

A. That is variable. The period of low water flow is during the summer and the entire amount was being diverted only from probably four to six weeks during those two summers.

Q. Was the water being put to use that was being so diverted?

A. So far as the Sunnyside Canal is concerned it was all being put to use.

Q. Can you state conditions as to 1909 and 1910?

A. 1909 I am not familiar with. 1910 we diverted all the natural flow of the river and had to use some storage water.

Q. Do you mean that you had to use stored water in order to make up 650 feet, and that there was not

(Testimony of C. K. Tiffany.)

sufficient natural flow to give you from that source 650 feet, or that you merely had to use some storage in excess of 650 feet, obtaining that amount from the natural flow?

A. I don't believe I can answer that question.

Q. Were you ever able to obtain a full appropriation of a thousand second feet flow during low water season subsequent to 1905? A. No, we were not.

Q. And how would you define your water season for the purpose of that answer you just gave?

A. The seasons when the natural flow in the river is not sufficient to meet the appropriations.

Q. That would be for a longer period than four or five weeks that you just referred to above?

[12] A. In some years it was for longer periods.

Q. What I am getting at, that low water season then which you would not be able to obtain 1054 second feet, would that persist longer than five or six weeks?

A. No. Most of the years, practically every year since 1910, that season has lasted from about the middle of July into September and sometimes into October.

Q. Now, when you say that the low water season is such that the Sunnyside Canal would not be able to obtain 650 feet from the natural flow of the stream, does that mean that other appropriators would be required to reduce their diversions in order to permit the Sunnyside Canal to obtain the 650 feet?

A. That is just what I mean.

Q. These other appropriators would be subsequent

(Testimony of C. K. Tiffany.)

to the rights of the Sunnyside Canal?

A. Yes.

Q. Now, Mr. Tiffany, will you outline briefly the plans of the United States or the Yakima project, merely touching upon various units in general terms; beginning with the Sunnyside unit what is the proposed area of that unit when it is completed?

A. The Sunnyside unit will bring under irrigation about 102,000 acres.

Q. How much for the Tieton?

A. The Tieton unit 34,000 acres.

Q. What is the proposed area of the Wapato unit?

A. The Wapato unit will cover approximately 120,000 acres.

Q. How far has the Wapato unit been developed, Mr. Tiffany? [13]

A. There are now being irrigated approximately 40,000 acres under the Wapato.

Q. Will you state what the present plans are for that unit? A. As to construction?

Q. Yes.

Mr. GRAVES.—What do you mean as to construction? Do you mean the construction plans, engineering plans?

Mr. BURR.—No. I refer to the status of the Wapato unit. Do you object to his testifying as to that orally?

Mr. GRAVES.—No objection to his testifying to anything he knows. See whether he knows. I don't know whether he knows anything about it or not.

Q. Is the plan for the Wapato unit that the

(Testimony of C. K. Tiffany.)

Reclamation Service shall do the construction work, Mr. Tiffany?

A. As I understand it, the plan is, that the Reclamation Service shall construct the necessary storage.

Q. How far has that plan been outlined, as far as you know? What is the status of those plans, Mr. Tiffany, if you know, in what form are they embodied?

A. They are embodied in the form of an Act of Congress.

Q. A bill you mean, don't you?

A. A bill before Congress, I should say.

Q. Is that bill introduced, if you know?

A. I understand that it has been introduced.

Q. Now, how much land does that bill purport to irrigate? A. 120,000 acres.

Q. Would that land be irrigated under any appropriations made by the United States Government under the Reclamation Act?

[14] A. It would be.

Q. That is the plan, is it?

A. That is the plan.

Q. Mr. Tiffany, does that 120,000 acres contemplate all the irrigable lands in reservation? In other words, are they any pumping units in addition to that?

A. That includes the pumping unit from the gravity supply of the Wapato Project.

Q. Now, Mr. Tiffany, with regard to the Benton

(Testimony of C. K. Tiffany.)

unit; how large an area would be proposed to be irrigated by that unit?

A. The Benton unit will cover approximately 90,000 acres.

Q. Do you regard that as feasible? A. I do.

Q. The High Line unit, Mr. Tiffany; what is the area approximately which would be proposed to be covered by that? A. 100,000 acres.

Q. So far as that has been developed do you regard that as feasible?

A. Well, I regard it as one of the most feasible projects.

Q. Mr. Tiffany, the supply that would be delivered to the Benton and the High Line units yet to be constructed as parts of the Yakima project, those possible to water, would be from what source?

A. It would be from the Yakima River, utilizing, so far as available, the natural flow, and supplementing that with storage waters from reservoirs at the head waters.

[15] Q. Would the feasibility of those projects be interfered with if the natural flow could not be delivered to them, but in lieu of natural flow the entire supply would be required to deliver from the storage reservoirs, or would they be feasible irrespective of that?

A. The full development of the project would be impossible without utilizing to the greatest possible extent the natural flow; that is, it would be necessary to cut out a large area that is supposed to be watered.

(Testimony of C. K. Tiffany.)

Cross-examination.

Q. (Mr. GRAVES.) What amount of land under the Sunnyside Irrigation Project would this 650 second-feet of water irrigate, what number of acres?

A. It would irrigate, when the land is fully developed, approximately 60,000 acres.

Q. In 1905 you did not have 40,000 acres in cultivation under the Sunnyside project, did you?

A. No, sir, not 40,000, I think.

Q. Didn't your report to the Reclamation Service in 1906 report that there was that year 40,000 acres? Just to refresh your recollection. In other words, what I want to get at is, in 1905, you had not much beneficial use of even your appropriation of 650 feet.

A. Yes, we had.

Q. Well, if you can irrigate 60,000 acres and you had only 40,000 acres under cultivation, you were not using the full amount of 650 second-feet to irrigate that 40,000 acres?

[16] A. To explain that I would simply say, that in 1905 a large part of that 40,000 acres had been very recently placed under cultivation, and it required temporarily—it was absolutely necessary for the development of the land—a larger amount of water.

Q. Well, you did not have 650 feet used in 1905, did you, during the whole water season?

A. 1905?

Q. That was the time that this suit was brought by the Prosser Falls people against the Washington Irrigation Company. There was not that much water flowing by Union Gap, was there, at that time?

(Testimony of C. K. Tiffany.)

A. There was more than that flowing by Union Gap.

Q. Have you consulted the gauge measurement taken by the Government at that time to refresh your recollection?

A. I have not for several days, but I have quite recently.

Q. The Wapato Unit that you speak of is upon the Yakima Indian Reservation? A. Yes, sir.

Q. That does not come within the Reclamation Act whatsoever—you know that, of course—that is outside of the Reclamation Act, the watering of that land. A. No, I do not know that.

Q. What bill do you refer to as in Congress? Do you refer to a bill introduced by Senator Jones that is pending, or do you refer to an item in the annual appropriation bill, or is all you know about it, Mr. Tiffany, just hearsay, what you have read in the newspapers? A. I have read the Jones Bill.

[17] Q. You know that that bill has not passed the House, has it? A. I am not posted as to that, no.

Q. It has not been reported from the committee, has it? A. I couldn't say.

Q. It was introduced in the Senate and referred to the committee and has never been reported back from the committee. 120,000 acres in the Wapato project, you say. What you mean by the irrigation of that is this: The Indian Bureau is going to be authorized, or the plan is to authorize the Indian Bureau to build an irrigating canal system and the Reclamation Bureau is going to be authorized to

(Testimony of C. K. Tiffany.)

store water for use on the Yakima Indian Reservation—is not that the plan?

A. I believe that is the plan.

Q. And this construction of this canal and the construction for this stored water is to be charged up against the tribal fund, is not that the plan?

A. I believe part of it is to be charged against the tribal fund.

Q. And the whole cost of construction is to be charged against the tribal fund?

A. Of the distribution system.

Q. Yes. Well, if you are not clear on the items of the bill we will not go into it any further. I just wanted to see how far you had read it. The High Line, as you call it, there is no plan in prospect now to water those High Line lands?

A. There is a general plan for the development of the Yakima project, which includes that.

[18] Q. But the Government has not in view now, has not the intention now, of watering those lands, has it, anywhere in the future, has any definite plans? A. I think they have definite plans.

Q. You know that the Reclamation fund has not money enough to build that canal and store water for it, do you not?

A. I know that they have not at the present time.

Q. They have not any storage water for the Benton land, have they? A. Not at the present time.

Q. You know that so far as those high lands are concerned that an extensive survey was made covering those by the Northern Pacific Railway recently?

(Testimony of C. K. Tiffany.)

A. Yes.

Q. And they reported that project as not feasible under present conditions? A. I do not know that.

Q. You do not know that? A. No.

Q. Do you not know they turned over their plans to the Reclamation Bureau at Washington, gave them their plans, their surveys, and reported that they did not think it feasible to carry it out, but would lodge those plans with the Reclamation Bureau? A. No, I do not know that.

Q. You know that the plan of watering the Kit-titas Reclamation District lands up there that you spoke of a moment ago is entirely dependent upon the sale of its bonds in order to procure the money to build canals, [19] and that there is no money for that purpose except by the sale of the bonds?

A. It depends upon some means of financing, of course.

Q. And you know that those bonds have been authorized for over two years now and no sales have been made yet? A. I know that.

Q. You know that to be a fact? A. Yes.

Q. You know that the Tieton project—how many acres out of the total Tieton project are you irrigating now? A. We are irrigating 20,000 acres.

Q. How long has that unit been under operation?

A. Three years.

Q. You know that it is wholly problematical how soon you will bring the other area under cultivation, 14 or 15 thousand acres?

(Testimony of C. K. Tiffany.)

A. I know that the rate of development has been very rapid.

Redirect Examination.

Q. (Mr. BURR.) Mr. Tiffany, when the Sunnyside and Tieton projects were approved, in 1906, was the money for their completion entirely available?

A. It was not?

Q. The completion of those units was made by one allotment of Reclamation funds or by several?

A. It was made by several.

Q. Now, Mr. Tiffany, when the Sunnyside canal was about [20] to be taken over by the United States was the body of land which you have testified to as being 40,000 acres under cultivation, was that in a compact body or was that considerably scattered?

A. Largely scattered.

Q. What is the fact that irrigated lands so scattered tend towards the economic use of water or the reverse? A. The reverse.

(Witness excused.)

And thereupon a recess was taken until 1:00 o'clock the same day.

North Yakima, Washington, 1:00 P. M.,

July 1, 1914.

All present as at the morning session; continuation of taking of testimony as follows, to wit:

Testimony of Frank Herke, for Plaintiff.

FRANK HERKE, produced as a witness for the plaintiff, having been first duly cautioned and sworn, testified:

(Testimony of Frank Herke.)

Q. (Mr. BURR.) Mr. Herke, are you a user of water for irrigation purposes? A. I am.

Q. How long have you been a farmer?

A. I was born in Yakima County and I have farmed for 30 years—born here forty years ago.

Q. What ditch did you take your water from?

A. Out of the Piety Flat Ditch. Of course, we have been using—we began irrigating in 1881 or 1882; on the other ranch I am now there has been irrigation since '82.

Q. Where does the Piety Ditch take its water from the Yakima River?

A. About a mile below the Sunnyside Canal intake.

Q. Now, Mr. Herke, you have been farming on that place during all these years you have been a farmer?

A. We have farmed on that Parker Bottom place since 1891.

Q. When did you first take water through that Piety Ditch—that year? A. Yes, sir.

[21] FIRST DAY—AFTERNOON SESSION.

[22] Q. Your ranch was as early as any on the ditch, was it?

A. Yes, but our ranch was irrigated ten years prior to that time.

Q. Ten years prior to 1891?

A. Yes, nine or ten years prior to that.

Q. Now, Mr. Herke, have you been at any time short of water for your property? A. Yes.

Q. When did you first notice that shortage?

A. It was in 1900 or 1901.

(Testimony of Frank Herke.)

Q. And will you describe conditions at the time when the Sunnyside main canal and its water rights were purchased by the United States, that is, in 1905, will you describe conditions as to whether or not you got water enough at that time?

A. There was along in July that it commenced to work a hardship on us, from July 5th up to October—up to about the 1st of October when we quit irrigating.

Q. (Mr. GRAVES.) What year was that, Mr. Herke? A. That was in 1905.

Q. (Mr. BURR.) And that shortage was such that you could not get all of the water that you thought you were entitled to at times?

A. When we had our little dam, a little dam—we would put in logs and wood, and put in big boards and manure until it was dammed—at times it would be about half a head of water, what we would like to have, and at other times a little freshet would come on, a little rain or something and then we would have quite a little head again for a few days, and it would work like that, [23] and the fish came up one particular time, it was August 27th, and when we shut off the water too much they just come up in streams, I was a kid at that time, and we just scooped them up in hatfuls. I was a little bit of a fellow then, we had to do that to save our hops and crops.

Q. Were conditions similar after that time?

A. Well, after 1905, 1906, 1906, 1907, 1908, 1909, 1910, some years they would vary and get a little better, but I measured the waters the best I could

(Testimony of Frank Herke.)

with a rule or a square and I don't think we ever got over from four to eight cubic feet per second of time past our intake or up to our intake, that is, for the years 1906, 1907, 1908, 1909, and up to the year 1913, I don't think it averaged over—that is, from July 18th until October the first, that it averaged over from four to ten cubic feet per second of time, at my intake during those years. That is up to 1914.

Q. Did your crops suffer occasionally from drought?

A. Yes. In 1905 and 1906 was the worst.

Cross-examination.

Q. (Mr. GRAVES.) This is a private ditch of yours?

A. Yes, sir, it is a private ditch.

Q. You do not take water from the United States Government in any way?

A. Well, no. I am signed up with the Government now because I knew it was up to me to enjoin every water user from here to the head of the river, and I was up [24] against the real thing, see?

Q. What time did you sign up with the Government? A. Lately.

Q. How long ago, how many years ago?

A. Last January.

Mr. BURR.—They are taking their water through the Sunnyside Ditch, now, Judge.

Q. You know that in 1905 the intake of your ditch was then below where the reservation ditch then came out? A. No. In 1905 it was above.

Q. Above your intake?

(Testimony of Frank Herke.)

A. In 1905 we was maintaining an outlet with the reservation ditch.

Q. In 1905?

A. We maintained the same outlet in 1905 and 1906, and in 1907 I went above—no, 1907 they went above me, and in 1908—well, I got it down at the books at home, you know. You know, I kept the books of that ditch company, I can tell you exactly to a scratch.

Q. What I wanted to get was the location of your canal with relation to the new reservation canal.

A. Yes.

Q. Was that below or above the intake of your ditch in 1905?

A. The old Gilbert Ditch, you mean?

Q. I don't know what it was called.

A. Well, the Toppenish-Gilbert Ditch.

Q. Then there was a new canal, you know, the big canal, taken out in 1903.

A. In 1903 by the Indians?

[25] Q. Yes.

A. It was taken out by the Indians; the first digging was done in 1904 on the Gilbert Ditch; that ditch is right in with our ditch; put them right in the same location; he took out a little in 1903 and then enlarged it in 1904.

Q. Now, is that below or above your intake?

A. Same place, it would be taking from the same place, both of them. We built the two intakes right close together, and if theirs was dry I was dry and if I was dry they was dry.

(Testimony of Frank Herke.)

Q. You spoke of a dam that you had there in the early days. Did you maintain a dam across the river?

A. Yes, sir. We hauled a few loads of manure and took all the waters of the Yakima River. That was in 1900 or 1901.

Q. Since 1905 have you had any increase in water over what you had in 1905 and 1906? In other words, in late years has it been better?

A. Yes, in a way, because when the storage—the Government turned the storages loose and it gave it that steady pressure and it kept the ditch and laterals full now, whilst the dam Douglas was sending to the headgates of the Washington Irrigation Company—in 1898, 1899 and 1900, whilst Douglas handled the headworks at the Sunnyside Canal intake we could not get any water and I got after him once or twice and then he let us have more water.

Q. Do you know what made the water so low in 1905?

A. Why, there was a dry season in the mountains. I know [26] I took a trip up in the mountains—

Q. Well, did you happen to know that the Cascades Canal Company up at Ellensburg commenced to take water in 1905?

A. No, I didn't know anything about that.

Q. You don't know anything about that?

A. No.

Q. Did you know anything about increased diversions along the Natches River? The Natches, of course, feeds in above your intake.

(Testimony of Frank Herke.)

A. The Selah canal may have been enlarged, I don't know what caused it.

Q. You don't know anything about what caused it? A. No.

Q. You don't know whose diversion of water caused you to have a shortage down there?

A. Might have been natural drought in the mountains, I don't know what it was.

(Witness excused.)

Mr. BURR.—Plaintiff will offer in evidence this map.

Map referred to offered and received in evidence, without objection, and marked Plaintiff's Exhibit "C," and returned and filed herewith.

Testimony of A. J. Splawn, for Plaintiff.

[27] A. J. SPLAWN, produced as a witness for the plaintiff, having been first duly sworn, testified:

Q. (Mr. BURR.) Mr. Splawn, what is your official connection with the city of North Yakima?

A. Mayor.

Q. How long have you been in the Yakima Valley, Mr. Splawn? A. About seventy-two years.

Q. Were you familiar with conditions about the time that the Yakima project was contemplated as a project under the Reclamation Act?

A. Fairly well, yes.

Q. Do you recall as to the conditions that were imposed by the Government as to the construction of the project in the valley?

A. Yes. I was interested in the settlement of the water rights of the valley and was on a committee

(Testimony of A. J. Splawn.)

appointed by the Commercial Club, I believe.

Q. Were you connected in any way with the activities of that committee? A. Yes.

Q. In what way?

A. Why, spent almost all my time, day and night, in settling the water rights of the Yakima Valley. That is, the Government required an appropriation—at least as I understood it the Government required two hundred feet cut off of the different appropriations before they would come in here; that is, there seem to have been two hundred feet, two hundred cubic feet per second of time, appropriated, or claimed, more than the flow of the river at low water. So that had [28] to be adjusted, it had to go back to the Government, before they would take hold of any of the projects.

Mr. GRAVES.—I move to strike the answer for the reason that the Government's records show exactly the conditions which were imposed by the Government, through the Secretary of the Interior, and accepted by the water users of the Yakima Valley.

Q. Were the activities of the committee successful, Mr. Mayor?

A. Yes, sir, we succeeded admirably.

Q. And a contract entered into for that purpose?

A. Yes. Contracts were entered into.

Q. Do you recall whether a contract was entered into with the company that is the defendant in this case?

A. I understand this to be the West Side and Kittitas—

(Testimony of A. J. Splawn.)

Mr. GRAVES.—It is The West Side Irrigation Company.

A. (Continued.) No. I was not with the committee at that time. I was put on the committee after they had been up there. I was not one of the committee when that arrangement was made.

Q. Are you acquainted with the form of instrument, the execution of which was being advocated?

A. Well, I suppose I was, but at the same time it has been some time ago. I don't know that I could go to work and recall it. I would like to have it in so far as my work is concerned.

Mr. GRAVES.—We will stipulate, Mr. Burr, that exhibit "A" annexed to the Bill of Complaint, is the same contract forms signed by all of these canals and canal companies operating out of the Yakima River. The amount [29] of water specified they were, of course, different in each case.

Q. Do you recall whether The West Side Irrigation Company was one of the ditch companies with whom negotiations of this kind were carried on?

A. Yes, sir. I understood that to be the case.

Q. Do you know that of your own personal knowledge?

A. My personal knowledge, in that I have seen it and remember it. I do not know that I remember it all, but it was put down as different ones we could contract with. I kept track of them, generally carried most of them with me, and I remember seeing that agreement made, but I don't know that I ever read that contract.

(Testimony of A. J. Splawn.)

Q. That agreement was part of this program?

A. Part of the program.

Q. On the part of the committee?

A. That is my understanding, yes.

Q. May I ask the amounts that were specified in those agreements, the amounts of water, were they to be measured at the intake of these ditches from the river or to be measured at various points down each respective ditch.

Mr. GRAVES.—That is objected to as being immaterial as to any other contract except this contract, and at the making of this contract the witness has stated that he was not present and has no knowledge of its execution. Upon the further ground that the contract itself contains a statement as to how this water is to be measured.

A. Why, in all the contracts that I knew anything about or [30] had any connection with it was the understanding that it was at the intake, that that was to be diverted—I think it was from the intake.

Cross-examination.

Q. (Mr. GRAVES.) Your connection with this matter was this, as I understand you: you and other property owners in the Yakima Valley were desirous of having the Reclamation project, the Yakima project, undertaken; you understood that the Secretary of the Interior had imposed certain terms, and your committee was engaged in getting these different canal companies to sign this agreement. Was that it? A. Yes.

(Testimony of A. J. Splawn.)

Q. You yourself had no negotiations with The West Side Irrigation Company's officers?

A. No.

(Witness excused.)

Testimony of Paul Taylor, for Plaintiff.

[31] PAUL TAYLOR, produced as a witness for the plaintiff, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Taylor, what is your connection with the Yakima United States Reclamation Project?

A. I am a junior engineer, working under the instruction of the supervising engineer, with headquarters at North Yakima.

Q. What is the nature of your work?

A. Securing typographic data in connection with the stream and canal flow in the Yakima Valley and the study of the same for the ultimate development of the valley and for the use and regulation and operation of stored water.

Q. Mr. Taylor, how much land is under cultivation in the Sunnyside Unit?

A. There is this year 65,000 acres.

Cross-examination.

Q. (Mr. GRAVES.) How long have you been connected with the service under this project, Mr. Taylor?

A. Since the 28th of May, 1910.

Q. Do you recall from your records how many acres were under cultivation in 1905?

(Testimony of Paul Taylor.)

A. No, sir, I do not.

Q. Do you know how many were under cultivation in 1906?

A. No, sir, not without looking up those records.

Q. Assuming there were approximately forty thousand acres under irrigation in 1907, from that time down to 1910 there has been an increased area every year put in, has there not?

[32] A. Yes, sir.

Q. Every year there has been an increase?

A. Well, so far as I know there has. There has every year since I have been connected with the Reclamation Service.

Q. Now, in 1910, about what was the area in cultivation?

A. Well, sir, I don't remember without looking that up. I would want to refresh my memory before answering the question.

Q. Could you give me an idea of what percentage of increase there has been each year since you have been connected with the project?

A. In 1910 it is my impression there were between sixty and seventy thousand acres.

Q. And since that time you have increased it a number of thousand of acres each year until you have got up to your present 65,000? A. Yes, sir.

Q. That is the area under cultivation in 1914?

A. That is this year.

Q. What has been the increase this year over last year, would you say? Any material increase?

A. Now, if my memory serves me right, we irri-

(Testimony of Paul Taylor.)

gated last year 65,000 acres.

(Witness excused.)

Mr. BURR.—That is plaintiff's case.

PLAINTIFF RESTS.

[33] SECOND DAY—FORENOON SESSION.

Courthouse, Ellensburg, Washington, July 2, 1914.

All present as at preceding sessions; continuation of taking of testimony resumed as follows, to wit:

Testimony of W. A. Stevens, for Defendants.

W. A. STEVENS, produced as a witness for defendants, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Your name is W. A. Stevens? A. Yes, sir.

Q. Where do you live or reside at the present time?

A. My residence is in Long Beach, California, at the present time.

Q. How long have you been acquainted with the Kittitas Valley? A. Since 1873.

Q. Did you live in West Kittitas Valley since that time until you removed to Long Beach?

A. Yes, sir.

Q. About what time was it you went to Long Beach?

A. Well, that was 1910, December, 1910.

Q. Were you the owner of lands in the West Kittitas Valley? A. Yes, sir.

Q. Were you connected with the defendant, The West Side Irrigating Company, in any way?

A. Yes, sir.

(Testimony of W. A. Stevens.)

Q. From its organization on down to the present time? A. Yes, sir.

[34] Q. You have been a stockholder and sometimes director? A. Yes, sir.

Q. By West Kittitas Valley I assume you mean that portion of the Kittitas Valley that lies west of the Yakima river? A. Yes, sir.

Q. There are two small streams that irrigate some land in West Kittitas Valley, the Taneum and the Manashtash? A. Yes, sir.

Q. Those waters are used by the lands above The West Side Irrigating Company's canal?

A. Yes, sir, all of it practically. I believe all of it is used.

Q. And I believe you have knowledge that the waters of those streams have been decreed to those lands by a decree of the Superior Court of Kittitas County? A. Yes, sir.

Q. When, as near as you can recollect, was The West Side Irrigation Company formed?

A. In June, 1889.

Mr. GRAVES.—I have here certified copies of the original articles of incorporation, which I desire to introduce in evidence as Defendant's Exhibit "1."

Articles of Incorporation referred to offered and received in evidence, without objection, and marked Defendant's Exhibit "1," and returned and filed herewith.

Q. Mr. Stevens, who were the original incorporators? I do not mean their names, but who were

(Testimony of W. A. Stevens.)

they, what was their business and where did they live?

A. They were farmers living along the west side.

[35] Q. What was the purpose of forming this West Side Irrigation Company and taking of the canal from the Yakima?

A. To irrigate our farms and for the handling of the water—distributing amongst ourselves.

Q. The incorporators were all farmers and land-owners on the west side? A. Yes, sir.

Q. I will show you a contract, dated the 5th day of June, 1889, and will ask you if that is the original of the contract executed by The West Side Irrigating Company *any* and Clinesmith & Clerf for the construction of the canal?

A. Yes, sir. I see my signature there.

Q. That is your signature as secretary?

A. As secretary, yes, sir.

Q. Were you secretary at that time?

A. Yes, sir.

Q. To refresh your recollection you looked over this a few minutes ago? A. Yes, sir.

Q. This states the dimensions of the canal as proposed? A. Yes, sir.

Mr. GRAVES.—I want to offer that in evidence as Defendant's Exhibit "2."

Mr. BURR.—What is the purpose of it?

Mr. GRAVES.—To show the size of the canal.

Mr. BURR.—That merely?

Mr. GRAVES.—Yes, that and to fix the date of the commencement of the work and to show the size and

(Testimony of W. A. Stevens.)

dimensions [36] of the canal.

Mr. BURR.—Is the capacity stated here?

Mr. GRAVES.—Yes, sir.

Mr. BURR.—What is the capacity fixed at?

Mr. GRAVES.—Sixteen feet, fourteen feet, twelve feet. I would like to have the privilege of substituting a certified copy for this original at some time.

Mr. BURR.—That is satisfactory.

Contract referred to offered and received in evidence, without objection, and marked as Defendant's Exhibit "2" and returned and filed herewith.

Q. Mr. Stevens, did these contractors commence work under this contract for the construction of the canal in 1889? A. Yes, sir, almost immediately.

Q. Where was it that you planned the construction of a canal of these dimensions? I mean with reference to any intent which the corporators had as to irrigating lands.

A. Well, you mean now as to the size of the canal?

Q. The size of the canal. In other words, did you have in mind the intention then to irrigate all the land on the west side that came under the canal?

A. All land under the canal, yes, sir, and of course we were just farmers, didn't know just what we did want. We thought we would like to make the canal large enough to carry our appropriations that we thought necessary to irrigate the lands under the proposed canal.

Q. I will ask you right here to state how many acres of [37] land there are now under the canal under irrigation.

(Testimony of W. A. Stevens.)

A. There are something like 8,000 acres of land under the canal.

Q. I will ask you to state, in a general way, Mr. Stevens, but in a comprehensive way, what you farmers did from the time you formed this corporation, both as to the amount of work you did, what means you had and how you worked this plan out that you inaugurated in 1889.

A. Well, of course it was a long time ago, 25 years, but I will do the best I can at it. To go back a year prior—I would like to bring that in—we organized what was called The West Side Irrigation Company, to be taken out higher up. That, I think, was for \$15,000, and we worked hard to get that stock subscribed, but we found we could not get sufficient to start it; then the following year, 1889, we saw that we must have water; we was having lots of trouble and some of them was going to begin suit and they said if we would make an effort to get water out of the river, why, they would not bring the suit. So we decided then that we would organize and start at the mouth of the Taneum—

Q. By the mouth of the Taneum you mean where the Taneum empties into the Yakima River?

A. Yes sir, that is where we were to start. And we would endeavor to raise ten thousand dollars, which we did, and started to work. Well, there was no way of condemning land at that time to obtain right of way, and consequently we had to pay very high prices and by the time we got the right of way half of our money was [38] gone, ten thousand

(Testimony of W. A. Stevens.)

dollars; we paid five thousand dollars for a right of way. Well, we had to keep the work going, because this contract, I believe, will show that it was for about eleven hundred dollars per mile, which would take up all of our ten thousand dollars and more, too—eleven hundred dollars a mile for twelve miles. Well, we had to have money; so we went to Mr. Kauffman, who is cashier, I believe, of the Ellensburg Bank—

Q. Of the Ellensburg National Bank?

A. Ellensburg National Bank. And he said he thought he could get us the money if enough of us would sign the note. So I think there was about nine of us signed the note for seven thousand dollars; that we thought would cover the expense. Of course there was the expense for an engineer and flumes and bridges came outside of this contract price of eleven hundred dollars a mile. So we borrowed that seven thousand dollars and spent all of that, and the contractors, I believe, was broke and finally threw up the contract, and we went on then and worked as best we could; sometimes we got men to work for stock; we tried to assess the stockholders for so much and found that the laws would not permit that—we could not assess them; then these parties wanted their money; we mortgaged it for, I forget the amount, to take up this note; then it ran along and we had no means of raising any money and the mortgage was foreclosed. There were a number of them that would not pay up under the circumstances. The mortgage was foreclosed and I think it was Mr. [39]

(Testimony of W. A. Stevens.)

J. C. Lloyd that purchased it, that is my recollection of it, and then something had to be done. There would be a new company organized to buy the ditch again, I think that was the plan, and they all came in then and paid up their shares, amounting to some thirteen dollars a share, I think, and we got on our feet again. Well, of course, by this time we had completed the ditch in a way. Now I can't remember the number of years that went on, but finally I think they agreed to an assessment of something like fifteen dollars per share and we let our contract then to Mr. Coleman, Sharp and Bradshaw.

Q. You increased your capital stock to \$30,000, did you not, also, during these years?

A. We did, yes, shortly after this we increased that.

Q. We are talking about the years now from '89 on up to 1900? A. Yes.

Q. I want to interpose a question right here. What have you to say as to the condition, financial condition, of affairs in the Kittitas Valley during the years from '89 along to '98 and '99?

A. Well, you take it up to—they were terrible hard times, it just looked like we would go broke—some of us did go broke, some of them lost their farms entirely on getting this ditch stock; wheat went down to twenty-two cents a bushel delivered at the mill, and hay and all the farm products in proportion, so that it made it an awful uphill piece of work to do anything.

Mr. BURR.—I object to so long a record. I

(Testimony of W. A. Stevens.)

think a good [40] deal of this is not relevant.

Mr. GRAVES.—Not entirely, perhaps, and I will try to shorten it.

Q. During all of these years, however, what was the fact as to the using of this ditch and the increasing of the area of cultivation?

A. Oh, they increased as fast as they were able to get water to irrigate with and run the ditch and kept increasing it.

Q. Now, Mr. Stevens, when Clinesmith & Clerf completed their contract as far as they went with it was there anything done about turning water into the head of the ditch, head of the canal?

A. Yes, sir.

Q. How much water was turned in there?

A. Ten thousand inches.

Q. Has the head of that ditch, the original diverting intake, has that ever been changed?

A. From the old intake to the present headgate I think there has never been any change made.

Q. That is, its dimensions are the same?

A. Its dimensions are the same.

Q. What have you to say with your knowledge of all these transactions whether or not The West Side Irrigating Company continuously and diligently increased its diversions and use of water upon the lands in West Kittitas Valley?

Mr. BURR.—I object to that as calling for a conclusion.

Mr. GRAVES.—To a certain extent it does, but you wanted it abbreviated, and I am trying to ac-

(Testimony of W. A. Stevens.)

commodate you as [41] much as possible.

A. You mean did they go ahead?

Q. Did they go ahead diligently?

A. Yes, sir, they did, to the very best of their ability, right along.

Q. Do you happen to know whether at that time the so-called Sunnyside Canal, which the United States has now, whether that suspended work and went into the hands of a receiver?

A. I heard of it, I didn't know anything about it.

Q. Mr. Stevens, what interest has a stockholder got in this canal? What does his share of stock represent in your corporation?

A. At the present time a share of stock represents an inch of water, is my recollection.

Q. What I want to know is, is there anything in your method of doing business or your by-laws which makes The West Side Irrigating Company a profit-sharing institution?

A. Oh, the company has no profits.

Q. That is what I want you to state. What does the stock represent—what is the stock for?

A. Well, of course we paid so much money for it and we got an inch of water, I think, at the present time.

Q. These shares of stock represent water?

A. These shares of stock represent water, yes, sir.

Q. The water is distributed to the shareholders in proportion to the shares of stock which they hold?

A. Yes, sir, and he is assessed for maintenance and running expenses on that.

(Testimony of W. A. Stevens.)

[42] Q. And you assess the shares of stock for maintenance? A. Yes, sir.

Q. Does the canal company itself own any stock or own any water?

A. Oh, no, I think not.

Q. What is it as related to its stockholders?

A. It is simply a managing affair, I would call it. That is, it is organized for the distributing of water, and taking care of the canal and managing it, I would say.

Q. You have an acquaintance with such companies as the Manashtash Ditch Company and others?

A. Yes, sir.

Q. You use them simply as distributing agencies?

A. Yes, sir.

Q. For the shareholders? A. Yes, sir.

Q. What we sometimes term mutual water companies?

A. Yes, sir. As we used to say, we were putting ourselves in shape to sue and be sued.

Q. And it seems you met with success in this particular case? A. Yes, we got sued.

Q. Did you maintain at the head of your canal any measuring device or arrangement?

A. No, sir.

Q. What was your method of ascertaining the amount of water being carried? Where was it measured, if at all?

A. Measured out to each individual stockholder; that is, a measuring-box or draw-box, as we called it.

[43] Q. So you never had any device by which

(Testimony of W. A. Stevens.)

you could determine how much loss there was by seepage? A. No, sir.

Q. You carried the water and diverted the water to the extent of the carrying capacity of your canal and then measured it out to the water users?

A. Yes, sir.

Q. Are you skilled sufficiently in measuring-boxes to describe to us the pressure you were using?

A. No, sir, I am not.

Q. Bt the box which Mr. Anderson went out and examined, those were the devices that you used?

A. Yes, sir.

Q. The unit of measurement that you used was the inches measurement?

A. The same as was used on the Manashtash.

Q. Did you or your company ever deal in water according to the second foot basis? A. No, sir.

Q. What was the term you always used relative to water? A. Inches—miner's inches, I think.

Q. Miner's inches? A. Miner's inches, yes, sir.

Q. And then you adopted a box and whatever that measured you called that inches?

A. Called that inches, yes, sir. That is all we knew.

Q. I will ask you this question: From your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4,000 inches, according to the measure of inches which you use, a [44] needed amount when measured out through the measuring-box taken out of the canal a necessary amount for the proper irrigation

(Testimony of W. A. Stevens.)

of this land lying under the canal?

A. I doubt very much if it is sufficient amount to irrigate all of the lands when put under cultivation.

Q. You doubt that it is sufficient? Then *you* answer would be that the full amount of 4,000 inches measured at that place and in that manner is necessary?

A. You mean through our measuring-boxes?

Q. Yes. A. Oh, yes, sir.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Stevens, did the West Side Irrigating Company or the Kittitas enterprise under its first organization, did that ever develop so as to deliver any water?

Q. You mean The West Side Irrigating Company?

Q. Yes, the original incorporation.

A. Oh, no, sir. We never did succeed in doing it.

Q. I noticed in some of the old maps there is referred to a West Kittitas Ditch. Wasn't that another name for your ditch? I simply want to get it in the record.

A. No, that was simply a name for the organization, the corporation. We organized and I think perhaps filed papers, but failed to get the amount of \$15,000.

Q. What I refer to is this: there are on some of the old maps references to the West Kittitas Ditch as constructed as a diverting and irrigating ditch. I take it that [45] is your West Side Ditch, is it not?

(Testimony of W. A. Stevens.)

A. No, sir. If there is any reference to the construction or anything of that kind, it could not be, because there was nothing of that kind. It was simply an organization which never did anything except to make some surveys. We did that and spent the money we raised.

Mr. GRAVES.—There is no other canal over there of that name except the West Side Irrigating Company's canal.

Mr. BURR.—Can we stipulate with reference to the references on the map, that those references to the West Kittitas Ditch refer to the West Side Canal?

Mr. GRAVES.—I think that is a fact.

The WITNESS.—After that they got the names mixed, you know. Once in awhile it would be called the West Kittitas Ditch instead of The West Side, they called it in that way.

Q. Now, Mr. Stevens, this reference to 10,000 inches; are you definite as to that figure, as to that capacity?

A. That is what our engineer and one of the trustees turned through.

Q. Who was the engineer? A. Mr. Mason.

Q. He told you there was a capacity there of ten thousand inches in the first mile?

A. Yes, sir. That was the report of the president and myself, I believe, and I think the board, as near as I remember it.

Q. Is that report in writing?

(Testimony of W. A. Stevens.)

A. Well, it might be if we took down the old records of that time.

[46] Q. What date would that be, Mr. Stevens?

A. That I would think to be in spring of 1890. That part of the ditch was completed, I think, during the fall and summer.

Q. How long was that first section?

A. That section was 1300 feet, and there was a wasteway or spillway, you might call it—there was a wasteway at our second headgate, as we termed it; then there was a wasteway where the water would turn back into the river, but we could have about that much turned down the ditch, you see.

Q. How much land was there, approximately, in cultivation at that time?

A. Oh, I have no idea how much.

Q. Nothing like your present amount, of course? It takes time to irrigate land?

A. Oh no, nothing like the present amount. We could get that though, if you want it, from the assessor's Assessment-rolls.

Q. Now, between the period of '73 when you came into the country and '89 when this construction begun, were you irrigating, Mr. Stevens?

A. Yes sir, I had a farm.

Q. You were irrigating from one of these ditches?

A. Yes, sir, from the Monashtosh, the old Monashtosh ditch.

Q. And did you continue to use from that ditch after the organization of this company?

A. Not after got water from the west side; oh, no.

(Testimony of W. A. Stevens.)

Q. When did you begin to get water from The West Side [47] Ditch.

A. I think we got some in 1890, but in 1891 we had sufficient.

Q. Now, Mr. Stevens, the original incorporation was for how much capital stock?

A. That is, the first incorporation?

Q. Yes, sir. A. Ten thousand dollars.

Q. You are now talking about the first incorporation of the West Side?

A. The West Side Irrigating Company was for ten thousand dollars, yes, sir.

Q. That was divided into two hundred shares at fifty dollars each? A. Yes, sir.

Q. Now did those shares represent the acres or how did you divide your water?

A. Oh, I don't know what they did represent. We just wanted to raise so much money to start the work.

Q. Your shares now represent water, not profit in the organization?

A. They represent water now, the four thousand—

Q. When did you make that by-law?

A. Well, now I couldn't tell just the date, but my recollection is that it was—it must have been 1908—somewheres along there. I couldn't tell you because I don't remember the date.

Q. Will the books show that, Mr. Stevens?

A. Yes, sir. I think our records will show.

Q. The original intention was to have shares of stock represent [48] water or profit?

(Testimony of W. A. Stevens.)

A. Well, I couldn't tell you—no, there was no profit in it.

Q. It was intended as a profit-sharing institution?

A. Oh, no. It was simply to irrigate our farms.

Q. What is the present capacity of that ditch at its point of intake?

A. Well, it would be fully as much then at the start. At the intake—I don't know how much about that intake, just what it would carry. I planned it too, or helped plan it. I think it will carry ten thousand inches comfortably.

Q. Those original contractors never completed the ditch, did they? A. No, sir.

Q. They completed a certain portion according to specifications, did they?

A. Oh, they completed it all along in places and they left other places uncompleted.

Q. The dimensions specified in that contract that you had with them, though, for the various sections in the twelve miles, that does not represent, does it, the actual construction during that period or for a long time afterwards?

A. What they constructed they constructed according to contract, that is what I mean. As to the dimensions of the ditch, they made them the required size, but there was a great many places they didn't put it to grade and there was cement gravel, what we termed cement gravel, that was struck and it was away up above [49] the grade.

Q. Now as a matter of fact they did not complete that below your spillway, did they?

(Testimony of W. A. Stevens.)

A. Sure they completed that below the spillway. I think the first two miles, perhaps the—I think the first six miles was completed.

Q. Can you positively state that it was completed for six miles according to the dimensions specified in the contract? Can you state that positively?

A. Let me think for a second now. Yes, sir, I think I am safe in saying that the first six miles were completed according to contract, or very nearly so. I am not positive as to where each station went; that is, what I mean to say, there was station one and station two comprising the first two miles—I think that you will find in the contract; then it was another two miles, but I don't know just where that ended; then there was another two miles which I know pretty nearly, which I can safely say was six miles of the ditch which I am pretty sure was completed, that six miles.

Q. By those contractors?

A. By those contractors, yes, sir. It was in the fourth station.

Redirect Examination.

Q. (Mr. GRAVES.) Mr. Stevens, taking the section of that canal from the point where it leaves the river and follow it down during its course, say of two to four miles, where is the drainage of that canal; in other words, [50] any loss from drainage, where does that go, if you know? What is the slope?

A. You mean the loss from drainage?

Q. Yes, from the canal.

(Testimony of W. A. Stevens.)

A. Oh, that goes right back into the river.

Q. Part way along the hillside there you are very near the river? A. Yes, sir.

Q. And there is no rise of ground or anything to divert any drainage water from the river?

A. Quite a distance there, there is a kind of slough; there was our greatest loss, and it runs right back into the river there, I would say, a quarter of a mile—drops right into a kind of slough, I would call it.

(Witness excused.)

Testimony of E. I. Anderson, for Defendant.

E. I. ANDERSON, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Where do you reside, Mr. Anderson? A. Tacoma.

[51] Q. What is your profession?

A. Civil engineer.

Q. How long have you been engaged in the practice of your profession, approximately?

A. Upwards of twenty-five to twenty-seven years.

Q. Did you ever reside in the Kittitas Valley, in the City of Ellensburg? A. Yes, sir.

Q. How many years were you here, approximately?

A. I resided in Ellensburg from 1888 until 1901 and from 1905 until 1908.

Q. When you left Ellensburg in 1901 you became an engineer in charge for the State Land Commis-

(Testimony of E. I. Anderson.)

sioner's Office? A. Yes, sir.

Q. Did you have a knowledge during all the time that you lived in Ellensburg, in a general way, of the West Kittitas Valley?

A. Yes, sir. I have been acquainted with that section of country since I came here.

Q. Did you ever make any examination of the Canal for The West Side Irrigating Company during the present year or just prior to the beginning of this suit? A. Yes, sir.

Q. In your capacity as an engineer you were employed for that purpose? A. Yes, sir.

Q. What years, Mr. Anderson?

A. I was engaged by the company during the year 1912 concerning matters relative to the pendency of this present litigation.

[52] Q. I show you a blue-print map and ask you under whose direction that was prepared?

A. That was prepared by myself to accompany a report of the results of my investigations for the company.

Q. Does this map correctly show the course of the Yakima River as marked upon it, the course of the West Side Irrigating Company's canal, and the area of country between the canal and the river, does it? It shows, in other words, approximately the location of the river and the ditch?

A. It was compiled from data filed here in the county offices. It does not represent a particular survey made by myself as to alignment, but it is compiled from data existing here in the county

(Testimony of E. I. Anderson.)

offices, showing the location of the ditch, the river and the lands.

Q. The question I asked you, the plan shows that to your knowledge correctly?

A. To the best of my knowledge it does.

Mr. GRAVES.—I would like to tender that as an exhibit in the case on our part.

Mr. BURR.—No objection.

Map referred to offered and received in evidence, without objection, and marked as Defendant's Exhibit "3" and returned and filed herewith.

Q. I wish you would describe, Mr. Anderson, as nearly as you can, the size and the dimensions of this canal as you know it now.

Mr. GARRECHT.—Objected to as immaterial as to what they were in 1912.

Mr. BURR.—He has not shown that he has any direct knowledge [53] or has examined the ditch. That is all taken from data selected by other persons, he is not qualified to answer that question.

Q. You went over the canal, Mr. Anderson, as I understand it?

A. My work in 1912, consisted largely in gaugings of the canal to determine the amount of water flowing through the canal, but it did not embrace an examination of all sections of the canal to determine its cross-sections; casings were at the various flumes along.

Q. Yes, but I want to know if you made investigation enough of it to state in general terms the size of the canal. Did you make any measurements

(Testimony of E. I. Anderson.)

there under this section or any examination of it?

A. I did. I made measurements at what is known as the Gordon flume on that canal, the Irwin flume and the flume immediately below known as the Ellison flume, which I am not certain is marked on that map, what is known as the Stevens flume and Monashtosh flume.

Q. Those are flumes which carry the water of the main canal?

A. Those are flumes which carry the water of the main canal over the depressions and canyons and so forth.

Q. I wish you would mark on this approximately where the Ellison flume is. It is not shown here, if you can give us some idea of where it is marked on the map, Defendant's Exhibit "3."

A. It is located at about the point on the canal line which I have indicated upon the map by a lead-pencil cross.

[54] Q. That is the Ellison flume?

A. Yes, sir.

Q. Have you, either from recollection or written data, any written data, information as to the dimensions of the Gordon flume, then coming down to those other flumes and give us those.

A. Yes, sir, I have a record.

Q. Can you give it from recollection?

A. I would rather refresh my memory by reference to my note-book.

Q. You may refer to it then.

A. I haven't it with me, it is down at the hotel.

(Testimony of E. I. Anderson.)

Q. Well, at this point which you gave me, have you that data? A. I have a copy of the report.

Q. Is there anything stated there so that you can refer to that?

A. Not as to the dimensions of those connecting flumes. My recollection is that the Gordon flume is about fourteen feet in width—

Mr. GARRECHT.—Just make the record show that we object to this testimony as to what these ditches and flumes were in 1912 on the ground it is immaterial.

Mr. GRAVES.—I will pass that then until the witness can have an opportunity to consult his memorandum; state, Mr. Anderson, what you did there in 1912 with regard to gauging.

A. I gauged the water and measured the water flowing through the flumes I have heretofore mentioned. I took measurements of the canal for the purposes of determining [55] the flow of water in the canal and for the purpose of collecting data upon which the discharge curve might be established, that would enable the discharge of the canal at any given gauge height to be estimated.

Mr. BURR.—It is possible we can stipulate the amount of that flow through the ditch.

Q. Mr. Anderson, did you see the boxes there which were used by the water users and shareholders? A. Yes, sir.

Q. Where the water was measured out of the canal? A. Yes, sir, I did.

Q. What system of measurement did they have?

(Testimony of E. I. Anderson.)

Q. (Mr. GARRECHT.) That was in 1912?

A. Yes, sir.

Mr. GRAVES.—I have shown by the other witness it was a continuous system up to that time.

Q. (Mr. GRAVES.) Now you may answer my question, Mr. Anderson.

A. The system of measurement for the distribution of water by The West Side Irrigation Company is a measurement of a quantity of water through an orifice in the sides of the box. Their measurement is analogous to the methods that were used in the early days by the miners in California, miners measurement of water, and the unit of measurement among them is what is known as the inch of water.

Q. Well, what I want to get at is what their measurement was as to pressure and the like, so as to determine the flow.

A. The West Side Irrigation Company's module for the [56] measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of that orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being five inches below the top of the box, making the total depth of the box twelve inches. In the operation of those for the distribution of water, they divert the water from the canal into what they term the draw-box, which is essentially a rectangular box, that is, in cross-section it is rectangular and extends in length sufficient to extend through the bank of the ditch, having a head

(Testimony of E. I. Anderson.)

in the main canal, and the amount of water that goes into the draw-box is regulated by just a sliding gate which works upwards. The function of that draw-box is simply to measure the amount of water to this measuring-box I have before described, and in the operation of this canal they admit an amount of water into this measuring-box until the water comes to the top of the box. The dimensions of the box vary according to the amount of the water that they have to discharge, those discharging a larger quantity being larger in size, cross-section, than those having a small quantity, the idea being to maintain the water at the top of this measuring-box in as quiet a condition as possible.

Q. Now converting inches into terms of cubic feet, how does their inch compare with the inch used by the United States Government in its measurement?

Mr. GARRECHT.—Before that question is answered we would [57] like to put in a general objection to the testimony to this effect: this testimony will not be relevant or material in our contention at all; it could not be relevant under the pleadings unless defendants first were entitled to show that there was a mistake at the time the agreement was entered into between the Government and The West Side Irrigation Company, and our contention is that under these pleadings the defendant company cannot question the terms of that written agreement because they are clearly stated in the agreement; there is no allegation of fraud and the terms are not ambiguous, but are clear. Now with that under-

(Testimony of E. I. Anderson.)

standing, that we can object to that class of testimony on those grounds, the witness may proceed.

Mr. GRAVES.—My purpose in doing this is that the agreement says 2d-foot and I want to know what that means.

Q. I will put it this way; take, say, four thousand inches as they have measured it, how many second-feet will that make?

Mr. BURR.—We object to this question because the witness has not shown the United States Government ever figured in inches.

Q. How many second-feet would four thousand inches measure under these farmers' way of measuring, what amount of inches converted into second-feet?

A. I don't know whether I can answer that off-hand or not. I think I can find it in the report here.

Q. Yes, refer to your report and find your figures.

A. The value of four thousand inches, as measured by the West Side Irrigation Company in the distribution of [58] water in the operation of their canal is the equivalent of 90.4 second-feet, according to the calibration of their boxes.

Q. Did you make any examination for the purpose of determining the loss in this canal by seepage?

A. Yes, sir, I did.

Q. Describe or state generally the sections of the canal where the seepage was the greatest and so on, commencing at the mouth and going down the canal.

Mr. BURR.—I object to that question. I do not think the seepage is material. If they are entitled

(Testimony of E. I. Anderson.)

to their water they are entitled to it irrespective of what seeps back into the river.

A. For the purpose of investigating the loss by seepage I divided the canal into five sections, the first section of which would be from the intake at the river to what is known as the Gordon flume, as marked upon the map (exhibit "3"); the second section would be from the Gordon flume to the Yearwood flume, as designated on the map; the third section would be from the Yearwood flume to the Stevens flume, as designated on the map; the fourth section would be from the Stevens flume to the Monashtosh flume, as designated on the map, and the fifth section would be from the Monashtosh flume to the lower end of the ditch.

Q. Give us the loss, tying down to those respective sections.

Mr. GARRECHT.—It is understood, Mr. Graves, that we do not have to repeat our objections each time?

Mr. GRAVES.—Certainly.

[59] A. I am at somewhat of a loss as to how to answer that question for this exhibit of the losses that I have here is based upon a number of different measurements and then I have an average of those, and as to what you desire in that respect—

Q. Well, what I want is an approximate estimate from your measurements there and your computations and your examinations, and your best judgment as to your results; your results is what I want. For instance; haven't you a measurement showing

(Testimony of E. I. Anderson.)

how much water was coming into the head of the canal and then what the loss was in that section under your general average? Of course it varies day by day according to the amount taken in, but your general average?

A. From the results that were taken there covering a period of five days of observation, between the Gordon flume and the Yearwood flume, the average loss in second-feet when the ditch was carrying between those two points an average amount of 69.7 second-feet was 2.6 second-feet, meaning a loss per square foot of area per day of 1.21 second-feet, or a loss per mile of two per cent.

Q. Now as to the next section.

A. From the Yearwood flume to the Stevens flume, an average of four days' observation of the canal when the average quantity carried by the canal was—average quantity is not stated in this, but for the four days, one of the days the quantity passing was 64.70. The next day the quantity passing was 64.40; the next day the quantity passing was 64.70, and the last day it was [60] 64.70; the average loss throughout those three days was three and a half second-feet in a length of canal of about five and a half miles, which means a loss per square of wetted area per day of .61 second-feet, or a loss per mile of nine-tenths of one per cent of the quantity carried.

Q. That section there was the least loss by seepage?

A. With the exception of one other it was the least.

Q. Go right along with the rest of it.

A. From the Stevens flume to the Monashtosh

(Testimony of E. I. Anderson.)

A. The records that I have been citing you are the results of the twelve observations in this canal. The results of the twelve observations show that in the manner in which they were distributing water in their canal, that in order to deliver four thousand inches of water at the head of the various laterals there it would require about 102—as the figures are here—102.1 second-feet to be diverted from the river to do that. The result of thirteen investigations carried along the same line gave a result of 104 second-feet to be taken from the river.

Q. Mr. Anderson, from your knowledge of the country there, the formation and so forth, where does this seepage water go to, where must it necessarily go?

A. It must find its way back into the river.

Q. In the Yakima River?

A. The Yakima River. No question about it.

Q. Referring now to the method of measurement; have you knowledge that the custom in the West Kittitas Valley, [63] outside of the use by The West Side Irrigating Company, of that unit of measurement being employed there—whether it is the custom of that section of the country to employ that unit of measurement?

Mr. BURR.—I object to that. The question of custom cannot be invoked where there is a contract specific of its terms as to the amount of water between the contracting parties. Custom is only proper in the absence of contract. That objection

(Testimony of E. I. Anderson.)

is in addition to the other objections we already have to this line of testimony.

A. The measurement of water, in using the inch as the unit of measurement and by modules for the measurement of that water, varying somewhat in character, is universal in the Kittitas Valley in the distribution of water along the flumes.

Q. Have you had an opportunity to examine and have you examined some of the decrees entered by the Superior Court of this County fixing these measurement units such as the Manashtash decree rendered in 1890?

Mr. BURR.—I object to that. The decree is the best evidence, and further, that a decree on another water right is not relevant to a water right on the Yakima. That objection is in addition to our other objections.

Mr. GRAVES.—I think I will let the question stand. I do not deem it material enough to introduce the Court's decree.

A. Yes, sir, I am familiar with the Manashtash decree.

Q. And the decree regarding the Taneum Creek, have you examined that?

[64] A. I have not.

Q. The Taneum Creek, where does it empty into the Yakima River with reference to the West Side Irrigating Company's canal?

A. It empties into the river a few hundred feet below their present intake.

Q. And speaking of this Manashtash decree, which

(Testimony of E. I. Anderson.)

is entitled Dray and Geddies against Johnson and others, that was the settlement of the rights with regard to the waters of Manashtash Creek?

A. Yes, sir.

Q. The one you referred to? A. Yes, sir.

Q. Where is the Manashtash Creek with reference to this West Side Irrigating Company's canal?

A. The Manashtash Creek crosses, or rather the West Side canal crosses the Manashtash at a point, I should judge, about two-thirds of the distance down from throughout the length of the canal toward the lower end.

Mr. GRAVES.—I will want to recall Mr. Anderson after he has got his notes, but you can cross-examine him now upon this part of it, if you care to.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Anderson, Defendant's Answer in this case refers to enlargements of the West Side Irrigating Company's canal. There was an enlargement made in 1909, was there not, that you were engaged [65] upon?

A. No. My only connection with the work that was done in 1909 was I prepared the specifications in the office; another engineer had charge of the work; I prepared the specifications for the work, actually, I think, in 1907, and that was the work that went over until 1909.

Q. Who was that engineer?

A. Mr. Ellison was the engineer in charge of the work on the job.

Q. Mr. Ellison was the engineer on the job, was he?

(Testimony of E. I. Anderson.)

A. He was the engineer on the job.

Q. Did you prepare these plans for the headgate of the same size or larger?

A. I did not prepare the plans for the headgate. The only connection that I had with that was at the request of Mr. Stevens, I think, who was president or one of the trustees, that I prepare the plans and specifications for the letting of the contract on the excavation at the intake. I had nothing to do with making the designs or plans for the headworks there other than in that capacity at that time.

Q. How far did they move the headgate at that time, do you remember?

A. The old headgate was located—well, I think, directly answering your question, it was about a thousand feet.

Q. Up or down the stream? A. Up stream.

Q. Just how much difference in elevation between the two points? Have you got the datum on those or either of them?

[66] A. I have not now. I can only give it to you approximately. I think the grade of that section of the ditch is about—my recollection of it is that it is five-hundredths to the hundred; that would make about a half a foot in a thousand feet; that is the grade of the ditch—I am speaking of the grade of the ditch from the intake down where it joins the head ditch. I may be mistaken about that, it is just simply my recollection of it.

Q. Well, how much difference in datum between the old intake and the new intake?

(Testimony of E. I. Anderson.)

A. I could not tell you, I don't remember.

Q. Well, how far along the river are those two points apart?

A. Not over a thousand feet, I think. Not farther than that, anyway.

Q. How long was the new canal which was constructed at that time from the river down to the old point upon the ditch where it joined the old constructed canal?

A. That was a thousand feet. That covered the first question that I intended to answer.

Q. Then the change along the river was a thousand feet and the change in the length of the canal was about a thousand feet?

A. They both ran parallel there.

Q. Now, Mr. Anderson, you say that seepage went right back off into the river. What is the average distance between the canal and the river? It can be gleaned from the map, but I would like to have it in the record.

A. Well, probably for the first quarter of a mile or fifteen [67] hundred feet from the intake the canal is very close to the river; it makes around an island there and the slough comes back into the river at the island, crossing just a short distance below.

Q. Is all that land between the canal and the river in cultivation at the upper end there?

A. The sections I am just now speaking of?

Q. Yes.

A. No, that is not. A portion of that is river land. I think there is a little island in there.

(Testimony of E. I. Anderson.)

Q. But I mean between the canal and the river say. There are trees there, are there not?

A. Not for the upper portion of it I have reference to.

Q. Now that seepage from there, does not that feed lots of vegetation, weeds and trees and growths of all sorts between there and the river? Is it not a fact there is all kinds of vegetation between the canal and the river, is there not?

A. At the section which we have under consideration at the present time, this slough is so near the canal that I do not think any extra vegetation would be caused by the seepage of water there. It would be naturally fed by reason of that slough running around so close to the canal. I do not think any extra vegetation is caused up there by *an* loss of seepage through this particular section we are referring to.

Q. But you do not mean to imply, Mr. Anderson, do you, that the water seeping under the soil will not be taken up by this vegetation as it passes?

A. No, I did not mean to imply any such thing as that. [68] What I want to imply is this, that such vegetation as there is there to take up this water would be there at any rate on account of the proximity of this slough, and whatever water was taken up, it would be a question whether it was taken up from the ditch or whether that seeps from this slough.

Q. There is vegetation all the way along, though, where the canal is much farther from the river than

(Testimony of E. I. Anderson.)

it is at the upper end, is there not?

A. Yes. There are places where the canal and the river are farther apart.

Q. The seepage water in that case will not run off into the river, will it? Will it not be taken up by vegetation in the meantime?

A. There will undoubtedly spring up certain vegetation that would consume a certain amount of water.

Q. Now, Mr. Anderson, the loss in a canal of .6 of one per cent of the amount it carries per mile—did I understand you correctly that .6 of one per cent is the loss per mile?

A. Yes.

Q. Is that very excessive?

A. Not at all.

Q. That is pretty conservative, is it?

A. .6 of one per cent a mile, that I only found in those sections of the ditch where there was the least loss by seepage, and the fact that the seepage there appears to be so light can be explained by the fact that in the lands immediately adjoining this ditch and above it through these sections are irrigated and that undoubtedly [69] the loss by seepage through those sections in there is recompensed by the loss of seepage from irrigated lands above, while at the upper and lower ends such conditions of affairs does not exist.

Q. Now, Mr. Anderson, in 1909 the enlargement we spoke of before, was not the ditch extended at its lower end very materially?

A. I am not conversant with the work that they did on the extension in 1909. My only connection

(Testimony of E. I. Anderson.)

with it, as I stated to you before, was the preparation of a certain set of specifications covering the contract at the head of the ditch. I was not in charge and was not employed by the company as an engineer in charge of that ditch at the time.

Q. Do you remember how many yards the excavation covered?

A. My remembrance is now that the contract was let on a unit basis, was to be paid for at so much per yard, which was to be returned by the engineer in charge, and that was a matter with which I had no connection.

(Witness excused.)

Testimony of H. G. McNeal, for Defendant.

[70] H. G. McNEAL, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Where do you live, Mr. McNeal?

A. Across the river on the west side, about three miles and a half from town.

Q. Are you a stockholder of The West Side Irrigating Company? A. Yes, sir.

Q. Landowner under the canal? A. Yes, sir.

Q. How long have you had a holding out there?

A. Since 1890.

Q. Since that time have you been acquainted with the canal?

A. Yes, sir, a greater part of the time.

Q. There was something said here about the extension being taken over by the company. Just

(Testimony of H. G. McNeal.)

state what the extension was.

A. That extension was built originally by the stockholders and later was taken over by the ditch company. There was stock owned below where the ditch company originally owned the land, there was lots of stock owned beyond that, and those stockholders maintained an extension to cover their land.

Q. Did they maintain it as a lateral?

A. Yes, sir, as a lateral.

Q. And they always used water through that extension? A. Yes, sir.

Q. And then do you remember what time it was that the company took this over and maintained it?

[71] A. I could not tell you exactly; about 1905, I should judge. I am not positive, although I was one of the Directors at that time.

Q. It was done prior to the contract with the Government? A. Long before, yes, sir.

Q. Now is there any flume in that canal now that was there at the time this canal was constructed?

A. There was three years ago. I have not been on the board since then.

Q. But up to three years ago there was?

A. Yes, sir.

Q. Where was that?

A. In Mrs. Ellison's field.

Q. This flume known as the Ellison flume?

A. Yes, sir. It is a box flume, about—I couldn't say, perhaps forty-five or forty-eight feet—I think three lengths, three sixteen foot lengths, I think, forty-eight feet.

(Testimony of H. G. McNeal.)

Q. And that flume three years ago was of the same capacity it was originally?

A. Yes, sir, never had been rebuilt.

Q. Do you know anything about the work that was done at the intake of this canal some few years ago—five or six years ago? A. Yes, sir.

Q. I think it was in 1909.

Mr. BURR.—That is my recollection of it.

Q. If you know, state how that happened to be constructed there or repaired.

A. The river was digging away our old headgate, washing in [72] there and first we built a dam there so we could get water into our intake, and we put the dam on the wrong side of the river, consequently it forced the river away from us; then we seen what we were doing and we had to take and move the intake up the river to where it is now. The intake is substantially of solid rock, and the river never changes its channel.

Q. That was simply done then to repair the intake? A. Yes, sir.

Q. Get a more permanent intake? A. Yes, sir.

Q. Mr. McNeal, were you one of the trustees at the time this contract was entered into by which you agreed to take eighty second-feet of water?

A. Yes, sir.

Q. By whose authority did the President and Secretary sign that agreement?

A. I presume from the trustees.

Q. To refresh your recollection, was it not solely

(Testimony of H. G. McNeal.)

by resolution of the trustees and not of the stockholders?

A. Yes, sir. It was not by the stockholders.

Mr. GARRECHT.—We object to that. I think the minute-book would be the best evidence.

Mr. GRAVES.—All right; I will read it into the record. I have the Secretary here, but if you will admit this is their book I will just read it into the record that part of it. I do not want to put the book in evidence.

Mr. GARRECHT.—We want to object to this testimony on the grounds there is no allegation in the pleadings that the contract was not properly entered into, and all of this [73] line of evidence is an attempt by oral testimony to explain, modify, vary and enlarge the terms of a written agreement which is clear and unambiguous and which was executed and delivered by the defendant to the plaintiff. There is no allegation in the pleadings of any mutual mistake or that the contract was procured by the fraud of the Government.

Mr. GRAVES.—Do you want me to prove by the secretary that these are the minutes?

Mr. GARRECHT.—No. If you state those are the minutes that is all right.

Mr. GRAVES.—May I read this into the record instead of introducing the whole book?

Mr. GARRECHT.—That is all right.

Mr. GRAVES reads:

“Ellensburg, Washington, October 21, 1905.

Trustees Meeting at Kauffman & Frost's Office,

(Testimony of H. G. McNeal.)

all the Board being present except Sheldon and Mitchell Stevens. The following business was transacted:

The Secretary was notified at this meeting that on April 20, 1905 an extension was voted by the whole Board of Trustees and accepted as an extension of the main canal of The West Side Irrigating Company in accordance with a resolution of the stockholders at the annual meeting December 5, 1903.

Motion by W. A. Stevens, seconded by McNeal, that the President and Secretary be instructed to sign contract with Government accepting 80 cubic feet of water per second from April 1st to October 1st and [74] 34 cubic feet per second from October 1st to November 1st of each year as The West Side Irrigation Company's appropriation of waters of Yakima River, providing that the Government completed the Yakima River Irrigation Project. Carried.

J. O. Gibson was instructed to pay single men thirty cents per hour and men with teams fifty-five cents per hour for labor of unloading gravel and to charge twenty-five cents per meal or five dollars per week for board.

Motion duly made and seconded to draw orders as needed in favor of J. O. Gibson to defray expense of enlarging canal, in amount of fifty dollars each. Carried."

Q. (Mr. GRAVES.) I see, Mr. McNeal, that you were one of the parties who took part in this trus-

(Testimony of H. G. McNeal.)

tees meeting, seconded that motion. Do you know with whom you had had negotiations regarding entering into this contract before that time?

Mr. BURR.—We object to that. The negotiations were not part of the contract and the contract speaks for itself; the negotiations leading up to the execution of the contract are incompetent.

Q. Do you recall who it was, the gentlemen's name? To refresh your recollection, wasn't that an engineer by the name of Noble?

Mr. BURR.—I object to that as leading.

Mr. GRAVES.—I will supply it by another witness.

Q. Do you recall who it was?

[75] A. Yes, sir, I do now.

Q. Where did he interview the trustees, if you recall?

A. I could not say. It was either here in the courthouse or over at Kauffman and Frost's office, I couldn't say which.

Q. What was done with the contract after it was signed, do you recall now?

A. No, sir. I could not tell you that. The president or secretary looked after that.

Q. The president or secretary were attending to that? A. Yes, sir.

Q. Under what conditions was it, Mr. McNeal, that he stated to you and that you agreed to put in this 80 cubic feet—the term 80 cubic feet?

Mr. GARRECHT.—It is understood, Judge

(Testimony of H. G. McNeal.)

Graves, that this all goes in under our same objection?

Mr. GRAVES.—Under your same objection, yes. It will be considered as being made right straight through to all that line of testimony.

A. Well, my understanding was that the 80 cubic feet was the equivalent of four thousand inches of water, the equivalent of four thousand inches as we measured water.

Q. How was that?

A. The 80 cubic feet we were told by the Government engineer was the equivalent to four thousand inches of water as we measured water.

Q. How did you measure it?

A. The only place we measured it was at our various measuring places where we delivered water.

[76] Q. That is, as I understand you, by this term of 80 second-feet, or 80 cubic feet, you intended to limit your appropriation from the Yakima River to the actual amount of water that you had been using through your canal?

A. Yes, sir, not to exceed four thousand inches at the low stages of water.

Q. Did you or any of the trustees have technical knowledge that would enable you to convert the terms of inches into cubic feet or second-feet?

A. I remember the question came up there and I think it was Judge Kauffman—I remember asking him in particular ; I asked him if 80 cubic feet was equivalent to four thousand inches, that was our idea, and I asked him, and he said it was practically the same thing.

(Testimony of H. G. McNeal.)

Q. What I was getting at was, did any of the members of the board of trustees have any knowledge as to converting the term of four thousand inches into cuoic feet?

A. I did not myself. I could not say as to the rest of them.

Q. You had nothing to do with the signing of this contract?

A. No, sir. Just the secretary and president signed it.

Cross-examination.

Q. (Mr. BURR.) Mr. McNeal, when did the stockholders build that extension that you spoke of?

A. When did we build it?

Q. Yes. You remember the first part of your testimony there about the extension. Were you under the extension?

[77] A. I was under the extension.

Q. Well, the extension that you spoke of, you are farther up, aren't you?

A. No, I am at the lower end of the ditch.

Q. Are you?

A. Yes. I was not at one time; I owned land originally, from '98 to 1903 or 1904, farther up on the ditch, but later on I bought at the lower end.

Q. And moved down there? A. Yes, sir.

Q. Now when you moved down there you put that land under cultivation that you got there, did you?

A. No, sir. That land has been under cultivation ever since I have been in the country.

Q. Now is not that under cultivation or under

(Testimony of H. G. McNeal.)

irrigation from some of these creeks?

A. No, sir.

Q. It was under this ditch, was it?

A. No, sir. Well, let me correct that; there is two ditches that run parallel; the upper ditch is a river ditch and the lower ditch is a creek ditch and they both cross each other and you can turn water from one to the other either way.

Q. That is true now, but was that true in 1905 when you moved over there? A. Yes, sir.

Q. Is not Mr. Fogarty a neighbor of yours?

A. Yes, sir.

Q. How much land does he irrigate?

A. I presume about two or three hundred acres.

[78] Q. How long has he been farming that land?

A. Well, more than twenty-four years, that is all I can tell.

Q. The whole of it?

A. Yes, sir, at least that much.

Q. Where does he get his water supply?

A. Out of the river, some of it; originally out of the West Side Ditch.

Q. Where does he get it now?

A. Out of the West Side Ditch, some of it, and some of it out of the river.

Q. How much does he get out of the West Side Ditch?

A. I couldn't tell you. The secretary could tell you how much stock he has, I couldn't tell you.

(Testimony of H. G. McNeal.)

Q. He gets out of the river where—out of his own private ditch?

A. What he gets out of the river comes out of his own private ditch, yes sir.

Q. When did he begin taking out of the river instead of taking his water from the West Side Irrigation Company's Ditch?

A. I couldn't tell you as to that.

Q. You have lived there twenty-four years, you say?

A. Well, but on some of it he can cover it from the West Side Irrigation Ditch and part he could cover from the river. But there is a man here that can tell you just exactly how much he can cover from the river and just exactly how much he can cover from the West Side ditch.

Q. Who is that?

[79] A. Johnny Morris, a neighbor of his.

Q. Now, Mr. McNeal, the intake which was built in 1909 after you found it necessary to move your place of getting your water from the river, was not that built a little larger than the old one?

A. I couldn't tell you as to that because I was on the board when that contract was let, and I think the year after, but not after the contract was completed. But the intake to the old ditch would carry more water than the new intake—it would the last time I was there.

Q. Is that statement made as the result of any measurements on your part?

A. No sir, just from observation.

(Testimony of H. G. McNeal.)

Q. And did you calculate the grades of the ditches at all?

A. The grades of the lower ditch, I think, was greater than the grade from the new ditch.

Q. They reached practically the same point, but the new ditch took up higher? A. Yes, sir.

Q. The grade from the higher ditch was greater than the grade from the lower point, was it not?

A. No, sir. The water is confined more at our headgates now than it was before. Where our new intake is we take the water virtually out where the river empties into the canyon, right at the canyon and at the old intake is where the river was spreading out, and it is always changing. We spent several thousand dollars in putting in a dam there. For two years we [80] put in what we called a permanent dam, but it went out each year for two years, consequently we moved it. It was a very expensive piece of work.

Q. Now, Mr. McNeal, you spoke about this agreement being the act of the Trustees. The stockholders, however, never objected to this agreement?

A. I don't think the stockholders—as far as I knew we didn't know that the stockholders had any rights in it. We supposed it was up to the directors.

Q. Do you mean to say that you had a shareholders' meeting—you attended the shareholders' meetings, did you not? A. Shareholders?

Q. Yes, the meetings of the shareholders or stockholders. A. Annually I did, yes, sir.

Q. When they met there in their meetings they

(Testimony of H. G. McNeal.)

never protested once to that agreement, did they?

A. I don't know that was ever brought up, couldn't tell you that it was or was not, because Mr. Noble came up here and gave us the kind of lecture at that time and wanted us to receive less than 80 second-feet and we had felt that we needed more, but the Government agent said that any time we needed more the Government would give us more water and so forth and led us to believe we were to have all the water we wanted, that they was not trying to do us out of anything.

Q. What was the purpose of this contract from the Government standpoint?

A. Because the Government wanted to use more water some place else. That is the way they put it up to us.

Q. What was the reason for that instrument? What reason [81] was there for wanting that instrument signed?

A. Just the same as any other contract.

Q. Well, the Government was not contracting work in the Valley then, was it?

A. They were below.

Q. As a matter of fact the Yakima project had not been approved at that time, had it, Mr. McNeal?

A. Well, it hadn't been approved at that time, but they expected it to be approved at that time. It was surveyed and it passed—

Q. The resolution that was passed by the directors of the West Side Irrigation Company was under the conditions that it be approved, was it not?

(Testimony of H. G. McNeal.)

A. I couldn't tell you.

Q. The resolution that Judge Graves just read, "That the president and secretary be instructed to sign contracts with the Government to accept 80 cubic feet of water per second from April 1st to October 1st and 34 cubic feet from October 1st to November 1st of each year as the West Side Irrigation Company's appropriation of waters of the Yakima River, providing that the Government completes the Yakima River Irrigation project." A. Yes, sir.

Q. Now what was the purpose of such an instrument? Was it not in order to give the Government a definite and certain figure that they would be able to rely upon as your right in the appropriation of the waters of the Yakima River?

A. I presume it was.

Q. And when you signed that, you knew, did you not, that [82] that agreement would be the limitation of your right?

A. From what authority we could get then we supposed that your second-foot amounted to the same measurement that we were already using.

Q. And when you authorized your president and secretary to sign that agreement your engineer told you it was the same, you have testified?

A. Yes, sir, I believe I did. I didn't say the engineer; I didn't say the engineer told us that—well, Mr. Noble said he was an engineer.

Q. There was practically fifty inches to the second-foot—is that what you testified?

A. I believe so.

(Testimony of H. G. McNeal.)

Q. Well, is not that true?

A. I couldn't tell you whether it is true or not.

Q. The equivalent just given by the—

A. I am not an engineer, don't know anything about measuring water in second-feet at all.

Redirect Examination.

Q. (Mr. GRAVES.) I don't know whether you were present or not; Mr. Burr asked you if the stockholders ever objected; your meeting was on October 21, 1905; I see here that there was a special meeting of stockholders January 2, 1906, where it is moved and seconded that no action be taken to relinquish any water. Was that the time you referred to when the stockholders were objecting to your action? A. I couldn't tell you.

[83] Q. You couldn't tell me?

A. No, sir, I couldn't answer that question.

(Witness excused.)

Testimony of Mitchell Stevens, for Defendant.

MITCHELL STEVENS, produced as a witness on behalf of the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Mr. Stevens, where do you reside? A. On the west side of the river.

Q. How long have you resided there?

A. For over thirty years.

Q. Have you been acquainted with West Side Irrigating Company's affairs since its organization?

A. Yes, sir.

Q. Have you been a landholder under and a stockholder in that company?

(Testimony of Mitchell Stevens.)

A. I have been a stockholder since 1902.

Q. Since that time you have been acquainted with the business [84] affairs of the company?

A. Yes, sir.

Q. Mr. Stevens, you were a member of the board of trustees at the time this contract was made in 1905?

A. Yes, sir.

Q. Will you state pretty fully and in detail the circumstances leading up to the signing of this agreement with the United States?

Mr. GARRECHT.—That goes in under our objection.

A. Well, there was a movement on foot to have some understanding with regard to the amounts of water being used and of the size of the appropriations of these ditches, with the end in view, as I understand it, that the actual amounts appropriated should be determined, and that the Government would undertake a reservoir to build and so forth. That is the way I understood it.

Q. And who approached the company with those negotiations?

A. Well, the question was up, I think, two or three times, or a number of times. It has been quite awhile, but Mr. Noble did at one time—

Q. Do you remember Mr. Noble's initials?

A. T. A. Noble.

Q. Was he a member of the Reclamation Service at that time?

A. I understood him to be.

Q. He was a civil engineer?

A. Claimed to be, yes.

(Testimony of Mitchell Stevens.)

Q. Now, was he present about the time that you had this trustees' meeting, was he up here in Ellensburg?

[85] A. Well, Mr. Noble was up here at different times, but whether he was present at the trustees' meeting I would hardly undertake to say. I don't know whether he was or not.

Q. Now, then state on what basis the board of trustees was proceeding in signing this agreement. This agreement was signed—the secretary and president were authorized to sign this by the board of trustees? A. Yes, sir.

Q. Now, upon what were you proceeding when you put in there the term “eighty second feet,” and how you came to limit yourselves to that amount.

A. Well, we had been led to believe that 80 second-feet was equivalent to four thousand inches of water as we measured that water.

Q. And therefore instead of using the term four thousand inches you used the term eighty second-feet? A. Yes, sir.

Q. Under that construction to you?

A. Yes, sir.

Q. Would eighty second-feet, as you afterwards came to understand it, would that supply your needs and appropriation? A. No, sir.

Q. Was there any intention on your part or the part of anyone else to limit yourselves to any less water than you were entitled to?

Mr. BURR.—We object to the question as leading.

A. No, sir. We did not think we was giving away

(Testimony of Mitchell Stevens.)

any water. The stockholders had understood, or at least I [86] understood, I can only speak for myself, that we were entitled to four thousand inches of water from the river—that we were entitled to use four thousand inches of water measured out to us, as we understood water measurements. That was our idea of this matter. We had always, for years and years, had always understood we were to have four thousand inches of water, that that amount of water would be necessary to irrigate our land.

Q. Where were you measuring the water, at what point?

A. At our laterals, where they left the ditch.

Q. Had you any measuring box at the head of your canal? A. No, sir.

Q. Had you any knowledge as to the amount of water that came in or means of measurement?

A. No, sir, we did not know how to measure it.

Q. Were you present when Mr. Anderson was testifying here, or had you come in at that time?

A. No, sir.

Q. Those measuring-boxes which Mr. Anderson observed and examined when he was there in 1912 and 1913, did they or did they not fix your unit of measurement—in other words, was that the way you were accustomed to measuring water?

A. Yes, sir. That is the only measurement we knew.

Q. You also have some land that cannot be irrigated from The West Side Irrigating Company's canal that you irrigate with water taken from the

(Testimony of Mitchell Stevens.)

Manashtash Ditch, do you not? A. Yes, sir.

[87] Q. How about the measurement fixed there, the custom of measuring there?

A. We use the same measuring-box on the Monashtosh that we had in the West Side Irrigating Ditch.

Q. And the Court fixed that in that Monashtosh case as the unit of measurement, did it not?

A. Yes, sir.

Q. You were a party in that case, I believe?

A. Yes, sir.

Q. State what the company did relative to its claim to this water after this agreement had been signed by the president and secretary; that is, was there any discovery made afterwards that the wrong method of measurement had been inserted in the contract?

A. Yes, sir. We afterwards, I can't just state the year it was probably—it might have been 1906 and might have been 1907, we were notified that we were running too much water—we were notified by Mr. Noble that we had to accede to the amount of water that we had been limited to and he left instructions to turn that water off. We found out that we would have less water than we were using and we refused to do it.

Q. Did you ever abandon the right to the use of these four thousand inches of water?

A. No, sir, we never did. A little while after that some of us went up to the head of the ditch and met Mr. Noble there. Mr. Noble protested that we

(Testimony of Mitchell Stevens.)

were using to exceed our amount of water, and we protested that we would not turn any water off; that we had to have that water as our appropriation, that that was our appropriation. [88]

Q. Did he make any statement to you regarding any stored water?

A. Yes, sir. He said that—seemed to realize that we were being pinched and he said he knew where we could get some stored water cheap.

Q. Then from that time up until the present time you have never abandoned the use of that water at all? A. No, sir.

Cross-examination.

Q. (Mr. BURR.) Mr. Stevens, you spoke of your appropriation, or of the company's appropriation.

A. Yes, sir.

Q. Did you ever file a written appropriation?

A. Not to my knowledge.

Q. Now it is a fact, is it not, that the stockholders when they met in their annual meetings never objected to the limiting agreement?

A. Well, the stockholders didn't suppose that they were taking a lesser amount than the appropriation. Some of them objected to any proposals at all along those lines—Mr. Coleman did, I remember that distinctly.

Q. Was that at a stockholders' meeting?

A. Yes, sir.

Q. Do you remember which year?

(Testimony of Mitchell Stevens.)

A. I would not like to be positive as to dates; I think it was 1905.

Q. This man did protest against that, did he?

[89] A. Yes, sir.

Q. Now, Mr. Stevens, do you recall whether or not you were a trustee in 1900? A. No, sir.

Q. Were you a trustee at that time?

A. No, sir.

Q. You did not become a shareholder until 1903, I think you said?

A. It is 1902 or 1903, I could not be positive of the year.

Q. When did you become a trustee or an officer of the company?

A. Well, I think it was 1904, but I would not like to be positive without refreshing my memory. I can't remember exactly.

Q. Now, Mr. Stevens, in 1909 the stock of the incorporation was increased, was it not?

A. Yes, sir.

Q. How much had the capitalization been prior to that time? What was it at the time that increase was voted upon?

A. I think it was thirty thousand.

Q. Thirty thousand dollars? A. Yes, sir.

Q. And how much was the par value per share?

A. The capitalized value was fifty dollars, but the actual value was far beyond that.

Q. Then you had how many shares, six hundred shares? Did that make it?

A. I think that was it.

(Testimony of Mitchell Stevens.)

[90] Q. Now it was testified this morning that a share represented an acre of water, was it not? You had four thousand shares; now it represented an inch of water, did it not, an inch of water per share and an inch to the acre?

A. Well, it didn't represent that. There is a lot more land than four thousand acres irrigated under the ditch. A share of water didn't represent an acre of land.

Q. What is your duty of water?

A. Why, in irrigating about seven thousand acres—

Q. No; how much do you deliver per acre, is it not an inch?

A. Well, in the neighborhood of an inch to the acre—in the four thousand inches.

Q. Well, how much do you deliver to an acre? You are a farmer, how much do you get? How many inches are you entitled to? How many shares have you?

A. I am entitled to the amount of water that my stock calls for.

Q. Well, what does your stock call for? How much stock do you own, Mr. Stevens?

A. I have 116 shares.

Q. How much land are you irrigating?

A. Well, other stockholders use part of that water part of the time. I am only using eighty shares for about a hundred and thirty acres.

Q. Now other men have a differing number of shares and the acreage that they own is not deter-

(Testimony of Mitchell Stevens.)

mined by the shares. A. No, sir.

Q. I mean the number of acres they irrigate is entirely separate from the shares?

[91] A. Yes, sir.

Q. Now one man might use two shares to the acre and other half a share to the acre?

A. That depends on the kind of land that he is irrigating. Some of it requires a half or three times as much as other acres do.

Q. When you increased from thirty thousand dollars how many shares did you have after the increase? A. We had four thousand shares.

Q. You increased your number of shares from six hundred up to four thousand? A. Yes, sir.

Q. Now where did that stock go, what became of that stock?

A. Oh, there was only twenty-three thousand dollars of new stock. It was figured out that we had—we aimed to capitalize the last time on the actual value and not the capitalized value of the stock. The actual value of the stock was not its speculative value, but the amount of money that we had expended on the ditch, was the way we got at it. We figured we had spent so much money on the ditch and then we used that as the measure of the capitalization. We figured, I believe, we had spent about \$57,000 on the ditch; then we decided to capitalize sufficiently to raise \$23,000 more money.

Q. Now where did you get that \$23,000, where did it come from?

A. Part of it was spent on the intake and part—

(Testimony of Mitchell Stevens.)

Q. No; not where it was spent; where did it come from— [92] selling shares?

A. Yes, the stockholders took the shares.

Q. And when they took shares were they entitled to water as a result of that? A. Yes, sir.

Q. How much water were they entitled to for each share?

A. We were supposed to run an inch to the share.

Q. But the old stockholders, they did not get any inch to the share? A. No, sir.

Q. That was a queer arrangement, was it not? The old stockholders did not get an inch to the share and the new stockholders did.

A. The size of that stock was different from the size of the old stock.

Q. The size of the new stock was not uniform, was it?

A. Yes, sir. The old stock under the old arrangement was five times the value of the new stock. We cut down the size of the share. The old stock called for one hundred dollars and the new stock calls for twenty dollars and the old stock was about five times the value of the new stock. The new stock had nothing to do—there was no relation between an inch to the acre on the new stock.

Q. But the old stock you declared an inch to the acre? Is that what you mean, that it was an inch to the acre of the old stock?

A. That was the idea.

Q. And a share was supposed to irrigate an acre, was it not?

(Testimony of Mitchell Stevens.)

[93] A. No, sir.

Q. Irrigate an indefinite amount? A. Yes, sir.

Q. Now who bought these twenty-three thousand shares or paid in the twenty-three thousand dollars? Do your record show that?

A. Well, I don't know whether the minutes do or not. The books would show it in some way. The treasurer's book ought to show it?

Q. (Mr. GARRECHT.) The stockholders knew about the contract you had entered into with the Government?

A. Well, a good many of them did.

Q. Well, didn't they all know it the following year, 1st of January, the following year, at the annual meeting?

A. I couldn't say that they did or did not.

Q. Was it not discussed?

A. Some of them have told me they did not.

Q. Well, was it not discussed at that meeting, at that meeting of the shareholders?

A. What was that date?

Q. The date of the meeting was January 2, 1906.

A. Well, I think it was.

Q. Was it not a minute made December 21, 1905, like this: It was regularly moved and seconded that a call meeting be held on January 2, 1906, to discuss the feasibility of entering into contract relations with the Government in the matter of the general agreement with the Government and other water users of the Yakima River. Was not that passed on the 21st day of December, 1905?

(Testimony of Mitchell Stevens.)

[94] A. I think it was.

Q. Then following that the meeting of January 2d, 1906, was a general meeting, was held and they did discuss it, did they not?

A. I think they did.

Q. So it was pretty generally known among the shareholders that you had entered into a contract with the Government?

A. Why, I think that the most of them knew it.

Redirect Examination.

Q. (Mr. GRAVES.) After the stockholders learned that you had entered into an agreement by which they had lost a large part of their appropriation did any of them ever assent to it, after they knew the facts?

A. Oh, no, no.

Q. I will ask you this in answer to the question of counsel; since the stockholders knew of the true status of affairs has any one of them ever assented to it?

A. Oh, no. Nobody wanted to give any water away.

Q. The contract, to refresh your recollection, shows here that it was moved that it be entered into by the president and secretary by the trustees, on December 21, 1905—is not this the fact; that on December 21, 1905, that this is the reading, I see that you were secretary pro tem and it is in your handwriting: "It was regularly moved and seconded that a called meeting be held on January 2, 1906, to dis-

(Testimony of Mitchell Stevens.)

cuss the feasibility of entering into contractual relationship with the [95] Government in the matter of the general agreement with the Government and the other water users of the Yakima River. After a general discussion, in which the sense of the meeting was found to be against any concessions of any water rights, motion carried unanimously." The motion carried unanimously to have a called meeting, was it not? That is the reading of this. And then on January 2, 1906—this is the entry—"Moved by W. A. Stevens and seconded by Goodman that no action be taken to relinquish any water at this time." If you don't recall this I want to read it into the record. You don't recall, as I understand, just what time it was that the stockholders discovered that you had signed this agreement, nor do you recall just what time it was that you know you had made a bargain to give away some of your water—you don't recall those dates, do you?

A. No, I don't recall the dates.

Q. But the fact—

Mr. BURR.—I object to so much leading.

Q. Well, I will ask you if it is not a fact that from the time it was discovered by the stockholders that the effect of this agreement, that they refused to ratify it? A. Yes, sir.

Q. I will ask you this question: Did you not soon after that take legal advice as to what steps you should pursue? A. Yes, sir.

Q. And have you acted on that legal advice since? [96] A. Yes, sir.

(Testimony of Mitchell Stevens.)

Q. That has been a matter of knowledge to the stockholders generally, has it?

A. Yes, sir, common knowledge.

Q. That those steps were being taken?

A. Common knowledge.

Q. And neither the stockholders nor board of trustees since that time have taken any steps except under legal advice? A. No, sir.

Q. (Mr. GARRECHT.) Was not that question of legal advice—Did not that come up on December 4, 1909?

A. Oh, no, it was long before that.

Q. (Mr. GRAVES.) I will ask you if when Mr. Noble was up there demanding that you buy stored water, or the like, if you did not call me up over the 'phone at Seattle?

A. Yes, sir, that same day.

Q. Long before any of these letters?

A. Yes, sir.

Mr. GARRECHT.—I want to offer the minutes of December 4, 1909, a resolution that was passed about employment of counsel.

Mr. GRAVES.—I have no objection to its going in the records, but I am going to prove something else if you put that in.

The WITNESS.—May I make a statement apropos of that?

Mr. GRAVES.—Yes.

The WITNESS.—The very first time that this water was attempted [97] to be turned off was the time when we decided to take legal advice, and

(Testimony of Mitchell Stevens.)

I called up Mr. Graves over the 'phone in Seattle and secured his services. I can't tell you just what date it was, I did not set it down.

Q. And later for the benefit of the stockholders and board of trustees you got a written opinion, did you not, from me and Mr. Gaby, or record?

A. Yes, sir.

Q. But that was years after? A. Yes, sir.

(Witness excused.)

Mr. GARRECHT.—I offer in evidence and will read into the records the minutes of December 4, 1909, the following:

“The following resolution, introduced by Mitchell Stevens, was adopted on his motion:

“WHEREAS, there exists a dispute between the United States Reclamation Service and the West Side Irrigating Company as to the amount of the water appropriated for the irrigation of the lands of its stockholders; and

“WHEREAS, the canal has been enlarged until it safely carries 5,000 miner's inches of water, measured under four and one-half inch pressure, said measurement being made at the several points of diversion of the laterals from the main canal; and

[98] “WHEREAS, said five thousand inches of water, when economically used are necessary for the profitable irrigation of the lands;

“THEREFORE be it resolved, that we, the stockholders of the The West Side Irrigating Company, in annual meeting assembled, authorize the trustees of this company to take such steps in the employment

(Testimony of Mitchell Stevens.)

of counsel, institution of lawsuits, or such other means as are necessary to secure our full legal rights to the water of the Yakima River. All contemplative settlements to be reported to the stockholders for their action, at a meeting called for that purpose."

Mr. BURR.—I would like to offer in evidence a certified copy of the certificate as to the increase of the shares and change of capitalization of The West Side Irrigating Company.

Paper referred to offered and received in evidence, without objection, marked as Plaintiff's Exhibit "B," and returned and filed herewith.

And thereupon a recess was taken until 1:30 o'clock the same day.

[99] SECOND DAY—AFTERNOON SESSION.

Ellensburg, Washington, July 2, 1914.

All present; continuation of taking of testimony resumed pursuant to recess as follows, to wit:

Testimony of E. I. Anderson, for Defendant (Recalled).

E. I. ANDERSON, recalled as a witness for defendant, testified:

Q. (Mr. GRAVES.) When did you last see the so-called Gordon flume?

A. I think it was in September or October of 1913.

Q. What do you say as to the appearance of that flume, as to whether it has the appearance of being the original flume constructed there in point of time.

A. It is an old flume; the lumber, the material of

(Testimony of E. I. Anderson.)

which it is made, shows the presence of age.

Q. Do you know whether or not United States officials ever made any measurements there when they have been measuring the water?

A. It has been my understanding—

Mr. GARRECHT.—Do you know of your own knowledge?

A. (Continued.) I have never seen any measurements made there.

Q. You never have seen any measurements made there?

A. Not by the United States Government.

Q. At the point at the Gordon flume shown here on this map, which we introduced in evidence and have marked as Defendant's Exhibit "3"?

A. No, sir.

[100] Cross-examination.

Q. (Mr. BURR.) Now, Mr. Anderson, in this report from which you refreshed your memory this morning on direct examination, I notice the following language, under the head "The West Side Irrigating Company's Inch," found on page 8, the language in question being found at the top of the next page: The orifice through which the water is measured for distribution under this canal is one having an average depth of four and one-quarter inches, and this orifice is said to discharge five inches of water for each lineal inch in length, the bottom of the orifice being three inches above the bottom of the box, constituting a reservoir in which water is raised until there is a pressure of seven inches on

(Testimony of E. I. Anderson.)

the orifice. As it was impossible to determine the discharge for each individual box, an average of the measurements of all the boxes was taken and a box selected for calibrating which most nearly represented the average box." Now, Mr. Anderson, these boxes varied in their nature, did they not?

A. There was a variation in the boxes.

Q. And your tabulation on page 11 shows that the size of the inch in terms of second-feet in the case of some sixty different water users or thereabouts was very materially different for the different places of measuring, does it not?

A. To what page do you refer now?

A. Pages 11, 12 and 13 of your report. For example; these figures of 194 in the first item represent 4.75 [101] second-feet, while down below in the list you will notice here (showing) that 212 inches is equivalent to 4.57 second feet. Now, as a matter of fact, Mr. Anderson, there was no uniformity whatever, was there, in these boxes so that they were scientific?

A. The boxes varied principally in the orifice, the aperture that was made through the sides of the box, and I don't know whether there is a list given—there was some seventy-five boxes along the line of the ditch *were* measured, and I don't know whether those are given in this report or not. I don't recall at the present time, but there were a few instances that I recall where they varied as much as that, where the maximum width that I found equaled four and a half inches and in none of them

(Testimony of E. I. Anderson.)

was the width less than four inches, unless it would be by an extremely small quantity. Now there might have been by an extremely small quantity some of them less than four inches, but not of any moment. But the maximum, as I recall it now, was four and a half inches. That represented a variation practically relative to the width of this aperture and there is where the greatest variation in the boxes, so far as dimensions are concerned, occurred.

Q. Wasn't there some impressure in those cases?

A. Now relative to the pressure and the miner's inch, I determined this inch was as follows. The manipulation of the box, that is, the pressure over the box, was carried on by the ditch rider and in the same manner and without any suggestion on my part—as to that my instructions simply was to him in this box I selected [102] for calibrating was to turn it in that box as he was accustomed to measure it out in the distribution of the water throughout the canal; then I simply took the water he turned in, that is, the number of inches in there, and afterwards calibrated them from a weir measurement down below, and this box was an average box—it was what I took to represent an average box as they are actually all measured.

Redirect Examination.

Q. (Mr. GRAVES.) In other words, in the construction and installation of those there would be a little variation, but they were all designed for the same class of measurements, were they not?

A. Yes, same general principles.

(Witness excused.)

**Testimony of Mitchell Stevens, for Defendant
(Recalled).**

MITCHELL STEVENS, recalled as a witness for the defendant, testified:

Q. (Mr. GRAVES.) Mr. Stevens, when you came to increase your capital stock to four thousand shares, or eighty thousand dollars, I wish you would just state now the [103] method in which you proceeded and how you happened to figure that out—just state it fully.

A. Well, there was an old debt on the company that had been hanging over it for a period of years. In 1903 and 1904, I think it was, Sharpe, Bradshaw and Coleman did a lot of work on the ditch and the ditch incurred quite a large indebtedness, and at the time that we reincorporated a portion of this money—

Q. By reincorporated you mean the time you increased the capital stock, do you not?

A. At the time we increased the capital stock, yes. At that time a portion of this money was desired to pay off that debt, and a portion of the money was to finish the new intake and a portion of the money was to make repairs along the ditch.

Q. Now, were the old shares of stock taken up?

A. Yes, sir. The old shares were taken up and the new shares were substituted therefor.

Q. If a shareholder had one share of stock in the old company how many shares of stock was he given under the new plan? A. Five shares.

(Testimony of Mitchell Stevens.)

Q. And then there was a balance over that would not be absorbed by the old shareholders at that rate?

A. Yes, sir.

Q. What was done with that?

A. That was sold to the old shareholders. This new stock was covering it, it was figured out that each of the old shareholders would be entitled to this new stock.

Q. And the old stockholders took all of this new stock [104] then? A. They took it all.

Q. Getting five shares for each share of the old stock for which paid nothing, and for the balance pro rata, they all paid twenty dollars a share?

A. Yes, sir.

Q. And that money you used to pay off your debts and to keep the canal?

A. Yes, sir. We used it to pay off the debts and to make repairs and to finish this new intake.

Q. So, if I understand you correctly, your idea in this was to give the actual value of property—

Mr. BURR.—I object to these leading questions all the time.

Mr. GRAVES.—I think enough appears, I will withdraw the question.

Q. You heard Mr. Anderson's reference to what is called the Gordon Flume? A. Yes, sir.

Q. When was that flume first built, Mr. Stevens?

A. The time the ditch was first made.

Q. And it is there yet? A. It is there yet.

Q. This work at the intake, Mr. Stevens, what was that for?

(Testimony of Mitchell Stevens.)

A. It was to secure a more feasible point of taking out the water. We have been putting dams at the head of that ditch; the dams are periodically swept out; we put in a brush and stone dam and that washed out; we put in a sack dam and that washed out; we put in a wooden [105] dam and that washed out and the water was cutting away the head of the ditch and also taking out the old headgate, the old headgate was getting dangerous, and we wanted to have a more feasible point of taking the water out, so as to eventually reduce the maintenance cost of the water, the intake was changed and a new intake put in.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Stevens, that intake you put in was larger, was it not, than the old one?

A. It was about the same size.

Q. You say it was about the same size; wasn't it a little larger? A. I don't think it was.

Q. Now another thing; that was how much farther up the stream?

A. My recollection is it is seventeen hundred feet.

Q. It is seventeen hundred feet up the stream?

A. Yes.

Q. And how far was it from the old headgate to the point of junction with the newly constructed canal from the new headgate?

A. About seventeen hundred feet.

Q. And the other question I asked you how far along the river was it; now how far down the ditch was it to the point of junction with the old line?

(Testimony of Mitchell Stevens.)

A. Well, I think that is seventeen hundred feet. You see, the river bank was very nearly—

[106] Q. About the same length as the other, was it?

A. About the same length. I never measured the river bank or anything like that, but it is very nearly the same length.

Q. And the old ditch that was abandoned, that was about seventeen hundred feet, too, was it?

A. The new intake dropped into the old ditch just right at the old intake—maybe fifty feet below the old headgate.

Q. I am afraid I don't understand that, Mr. Stevens.

A. The new intake drops into the old ditch, the head of the old ditch, right below the old headgate.

Q. But does it meet the same alignment at that point of junction?

A. Well, it is the same alignment, because of course we aimed to give it the same grade.

Q. From there on? A. Yes.

Q. But the grade above that point, the grade of the intake would be far larger than it was before, would it not, because it was seventeen hundred feet up the river? A. How was that?

Q. Your grade will be far larger, the velocity at the intake, because seventeen hundred feet up the river?

A. Oh, no. Having the same grade it would have the same velocity.

Q. Now, Mr. Stevens, with regard to those stock-

(Testimony of Mitchell Stevens.)

holders who bought this new stock; all the old stockholders bought this new stock?

[107] A. There was a few of them that did not.

Q. How much were they allowed to take, any amount they wanted to subscribe?

A. After a certain time—there was a limit to it, a time limit placed, in which the old stockholders were to take all the new stock in proportion to the amount they would be entitled to—in proportion to their stock.

Q. And after that time it was sold to outsiders, was it?

A. No, never sold to outsiders. It was sold to the old stockholders.

Q. How did the men that took it up get anything out of their purchases? You delivered water to them one inch to the share?

A. Certainly one inch to the share.

Q. And this was water they had not been entitled to if they had not bought the stock?

A. No. It would have the effect of lessening, to some extent the water of the fellows that didn't take it up, and the fellows that did take it up would get a little more water.

Q. Well, the fellows that didn't take it up were entitled to water the same lands they had before, were they not?

A. They would be if they took the new stock, otherwise they wouldn't.

Q. They all got a change of stock, didn't they, under this other plan you outlined?

(Testimony of Mitchell Stevens.)

A. Why, the old stock they already had; they were allowed five shares of new stock for each share of old stock.

Q. Now under that stock they were entitled to as much water by virtue of that exchange of stock as they had before [108] the exchange, were they not? They got the same amount of water under this exchange as they did before, did they not?

A. Well, not quite.

Q. How did you arrange to get them to use less water than they had used before when they exchanged that stock?

A. Well, there was some men that got it and who could do with a little bit less water; other men who needed more water—never had enough.

Q. And they bought the new stock?

A. Yes, sir.

Redirect Examination.

Q. (Mr. GRAVES.) Mr. Stevens, you say that this intake went up seventeen hundred feet. Are you sure as to those figures?

A. Well, I wouldn't like to be right positive, but that is the best of my recollection, that it was seventeen hundred feet.

Q. You are speaking of that as a matter of recollection? A. Yes.

Q. You were not on the board at the time that was done?

A. I was not on the board at the time the contract was let.

Q. You wouldn't put up your recollection as

(Testimony of Mitchell Stevens.)

against the statement of anybody who had actually made a measurement, would you?

A. No, I didn't actually measure it.

Q. (Mr. BURR.) Well, Mr. Stevens, I would like to ask you [109] if there were not considerable dirt excavations covered in that contract of 1909 at other points than at the upper end of the ditch—were there not considerable enlargements?

A. No. There was slides, backslides; that ditch ran about five miles along the side of a hill and those slides troubled us a good deal; those slides kept sliding in there and filling up the ditch and we expended considerable money in cutting away the bank above to prevent the sliding into the ditch. That made it a more feasible ditch in that way. Along the side hill there was a fill, there used to be more than there is now, the dirt would slip in, slip in and fill up along the outer edge and we had to dig that out. Then there was two or three places in cuts in the ditch that proved to be bad ones. There was one place where we had to blast out—

Mr. BURR.—That will do, Mr. Stevens. You have answered my question.

Mr. GARRECHT.—There is one thing I have not gotten very clear in my mind about this exchange of stock. I desire to examine the witness a little about that.

Q. (Mr. GARRECHT.) How much new stock was given for a share of old stock?

A. Five shares of new stock.

Q. For one share of old stock?

(Testimony of Mitchell Stevens.)

A. Yes, sir. The old stock represented a par value of a hundred dollars; that is to say, the original value of the old stock was in the neighborhood of something like fifty dollars, and this money that had been expended [110] from time to time digging out high places and narrowing one place and taking these slides out and so on had raised the value of that stock until we figured it was worth in the neighborhood of a hundred dollars, and since the new stock represented a par value of twenty dollars we exchanged by giving five for one.

Q. How many shares were in the old company?

A. Six hundred shares.

Q. And how many in the new?

A. Four thousand shares.

Q. Now that you say that a man who held one share of old stock and got five shares of new stock was not entitled to the same amount of water?

A. Well, it would cut him down a little bit.

Q. Well, how much did you cut it down?

A. In proportion to the stock. Of course his stock would figure a little bit less relatively to the whole number of shares than what it did. If he had taken his pro rata new stock it would have been just the same.

Q. That was done by agreement of all the shareholders? A. Yes, sir.

Q. They all agreed to curtail themselves the pro rata of the one thousand shares to the four thousand shares? A. Sir?

Q. That is, in the exchange that was made there

(Testimony of Mitchell Stevens.)

was let one thousand shares, were there not, when you exchanged one of your old shares for five of the new, that left one thousand unexchanged?

A. Yes.

Q. Well, that left one-fourth of the new stock?

[111] A. Yes.

Q. And you say that entire one-fourth was subscribed for by the old stockholders? A. Yes, sir.

Mr. GARRECHT.—Now I want to read into the record from the By-laws of the West Side Irrigating Company, Article II, Section 1:

“The corporate powers shall be exercised by a Board of Trustees composed of five shareholders who shall have been duly elected as trustees of the Company as provided in Article III, Section 1 of the By-laws.”

I want to read from Article V, Section 1:

“The Trustees shall make all regulations for distributing water and regulate the charge for the same; provided, the stockholders shall at all times have precedence over all others to water and the same shall be issued to them in proportion to the amount of stock held.”

Section 5, same Article:

“The Trustees shall have full power to establish the rates and enter into contracts for the sale of the water, and it shall be their duty, on or before the 1st day of April, of each year, to establish the price for which water is to be sold by the company for that year.”

(Testimony of Mitchell Stevens.)

Q. (Mr. BURR.) Mr. Stevens, did you buy some of this stock?

[112] A. Yes, sir.

Q. Do you still own it? A. Yes, sir.

Q. What are you doing with it? Are you getting more water than you did before? A. No, sir.

Q. What did you get for your money—you put in some good money, what did you get for it? Some of your neighbors did not buy and yet you bought—aren't you getting more water?

A. Well, sir, my neighbors are using some of this water.

Q. And you are still letting them have it for nothing? A. Yes, sir.

Q. Aren't you leasing it? A. No, sir.

Q. Aren't you renting it to them? A. No, sir.

Q. Haven't you sold it to them? A. No.

Q. Haven't some of those people that bought this stock sold it? A. That bought new stock?

Q. Yes, that bought some of this thousand shares of new stock?

A. I can't say as to that. I don't know what they are doing.

Q. Hasn't it a market value? A. Yes.

Q. Your stock has a market value? A. Yes.

[113] Q. What is it worth?

A. I judge it is worth about thirty dollars.

Q. What makes it worth thirty dollars if you don't get more water because you own it?

A. Scarcity of water.

(Testimony of Mitchell Stevens.)

Q. You get more water because you own that stock?

A. As a matter of fact, there is no—

Q. Answer my question, please. I say because you own that stock you get more water, don't you?

A. No.

Q. Doesn't the man that owns that stock get more water because of it, because he owns this new stock?

A. Why yes, he gets a little more water than he did under the old stock.

Q. And that is what gives it a value of thirty dollars a share, is it not, the fact that it means water—isn't that true?

A. Oh, there is a good many things enter into the value of it.

Q. (Mr. GRAVES.) Counsel did not give you a chance to answer that last question. When you subscribed for this new stock the benefit you got for it in buying it was paying off the debts of this company and repairing this canal, was not that one of the items? -.

A. Yes, sir.

Q. And those that took the amounts they were entitled to, their amounts were increased and those that did not take their amounts were decreased?

A. Yes, sir.

[114] Q. Instead of dividing it by six hundred shares you now divide by four thousand shares?

A. Yes, sir.

Q. On that basis? A. Yes, sir.

(Witness excused.)

Testimony of Jeff H. Lee, for Defendant.

JEFF H. LEE, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Are you a stockholder and officer in The West Side Irrigating Company?

A. I am a stockholder, but not an officer at the present time.

Q. Were you a stockholder in the year 1905?

A. Yes, sir.

Q. Was there a meeting which some of the stockholders attended [115] to meet Mr. Noble in this courtroom? A. Yes, sir.

Q. What was the purpose of that meeting as near as you recall? Why did Mr. Noble want to see you about it?

A. He wanted to see the various water users of the valley in relation to the amounts they would use.

Q. Were other canal people here at that time?

A. Yes, sir.

Q. What was it Noble said to you, if you recall it? Mr. GARRECHT.—Same objection.

A. He stated that the Government didn't have in mind to take anything from any companies that was using water, but only to find out their actual needs.

Q. What amount was The West Side Irrigation Company's stockholders claiming at that time? I refer to the amount of water they were claiming that they were entitled to take from the Yakima River under their appropriation.

A. We only knew of measuring water at the lat-

(Testimony of Jeff H. Lee.)

erals, where the water was being taken from the canal. Never had in mind taking readings anywhere else.

Q. And what was your understanding of the amount you were to have at those places?

A. We were to have four thousand inches, what Mr. Noble agreed to give us, as we understood it, and at that time I never had heard of a miner's inch, or an inch per second, and as I understood it at this meeting we was to get eighty cubic feet per second, which represented four thousand inches measured out to us at all times.

[116] Q. Now, you had some acquaintance with the other stockholders, I suppose, and it was talked among the stockholders somewhat around the district about this matter? A. Yes, sir.

Q. Do you know of any stockholder who ever consented to such contract as was actually signed after they discovered what measurement was to be used?

A. No, sir.

Q. What would you say as to the attitude of all the stockholders that you came in contact with when they discovered what sort of contract their directors had made—what was their attitude toward it?

A. They were all greatly disappointed, for there was none informed as to the measurement of water. We never had taken no measurement as to how much water came into the ditch at the intake; we didn't know.

Q. Had your right to the water of the Yakima

(Testimony of Jeff H. Lee.)

River been in any wise challenged by anybody, had anybody ever interfered with it or challenged it?

A. No, sir, not even thought of.

Q. When Mr. Noble came here to meet the water users and made that talk, what was the attitude of the people present as desiring to co-operate on fair and equal terms with the Government?

A. The people of the valley was very enthusiastic, because Mr. Noble made mention of the fact that in three years, or about that—we had been planning for a ditch, called the High Line here, and it would be built if we got to an understanding of how much water belonged to those below us that they could be sure of [117] that they could depend on in building this ditch, and the amount of water it would be necessary to store at the lakes.

Q. Was anything ever said to the stockholders by Mr. Noble or by anyone else that you were to relinquish or abandon any water that you had theretofore appropriated and had a right to use?

A. No, sir.

Cross-examination.

Q. (Mr. GARRECHT.) When did you first make the discovery about the mistake that you claim?

A. I was not on the board at the time that Mr. Noble was here, neither was I on the board at the time the contract was signed, and I couldn't say as to the date, but some months after.

Q. Well, this talk that they had here in the courthouse with Mr. Noble, that was before the trustees entered into the agreement?

(Testimony of Jeff H. Lee.)

A. I wouldn't be positive, but that is my recollection.

Q. Your recollection is that it was? A. Yes.

Q. Now, the date of that contract was some time in October, 1905. Do you remember being at this meeting in January, 1906, where this matter was discussed by the stockholders?

A. Excuse me; was that at the date when Mr. Goodwin made a motion that we relinquish no rights whatever?

Q. Mr. Stevens seems to have made the motion to which you [118] refer at the time.

A. Yes, sir; I was there.

Q. That was January 2, 1906, that was the date of that meeting or about that time. Now, do you know whether it was about that time that they consulted with Judge Graves? A. I do not.

Q. What Mr. Noble said was that he wanted to ascertain the actual needs of the people who were irrigating from the river; was that it?

A. That was my understanding.

Q. And that they had to find out what the different irrigators were going to insist upon before they could go ahead with their work?

A. No, sir. He didn't seem to be at all particular; he wanted only approximately that they might go ahead with their work.

Q. I understood you to say that he said something about the High Line ditch in connection with knowing definitely what appropriations were being made from the river.

(Testimony of Jeff H. Lee.)

A. He made mention—I don't remember the wording, but he made mention of that fact, that they had in mind that High Line and I think there had been a survey made.

(Witness excused.)

Testimony of Burt Pease, for Defendant.

[119] BURT PEASE, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Mr. Pease, you were secretary at the time this contract was signed?

A. Yes, sir.

Q. Do you recall where it was that the officers signed this contract?

A. I would not be positive, but it is my recollection that it was in Judge Kauffman's office, here in Ellensburg.

Q. And give us your best recollection of what was done with it.

Mr. GARRECHT.—This is subject to the same objection.

A. The best of my recollection is that the contracts were signed in duplicate; that the Government did not sign the contract yet, but it was left with Mr. Kauffman to be signed by the Government and returned to the company.

Cross-examination.

Q. (Mr. BURR.) You are the secretary of this company, are you, Mr. Pease? A. No, I am not.

Q. You were during what period?

(Testimony of Burt Pease.)

A. I couldn't tell you exactly. I couldn't give you the dates now; it has been so long, but I was secretary of the company for about five years successively.

(Witness excused.)

[120] Mr. GARRECHT.—I want to recall Mr. Stevens for a question or two.

**Testimony of Mitchell Stevens, for Defendant
(Recalled).**

MITCHELL STEVENS, a witness for the defendant, recalled for further

Cross-examination.

Q. (Mr. GARRECHT.) The time you called Judge Graves on the phone with respect to the water rights of this West Side Irrigating Company was about the time of this January, 1906, meeting when the stockholders were apprised of the Government's claim—is that right?

A. No. It might have been the summer following—it was in the summer.

Q. Probably in the summer of 1906?

A. Yes, I think so, 1906 or 1907, I couldn't be positive without looking up the correspondence. I could give you the date by looking up the correspondence.

Q. That is what we would like to get at as near as we can, Mr. Stevens, the date of that.

A. I have it at home.

Q. But you think it was the summer following that January meeting?

A. It was the summer following or the year after

(Testimony of Mitchell Stevens.)

that. It was the first time any warning was given to us we would have to turn water out of the ditch.

(Witness excused.)

[121] Mr. GRAVES.—I think that is all the testimony we care to offer.

DEFENDANT RESTS.

[122] DEFENDANT HAVING RESTED ITS CASE, THEREUPON PLAINTIFF OFFERED EVIDENCE IN REBUTTAL, AS FOLLOWS, TO WIT:

Testimony of J. C. Yearwood, for Plaintiff (in Rebuttal).

J. C. YEARWOOD, produced as a witness for the plaintiff, in rebuttal, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Yearwood, in the change of the intake there, what was the difference—Mr. Stevens gave his recollection at something like seventeen hundred feet—do you know what the actual distance was?

A. Yes, sir. The actual distance was 1050 feet, from about twenty-five foot on the river at the intake at the upper end of where it intercepted the old ditch at the lower end. I packed the tape or helped to survey the land out, and know that I am absolutely right. It is 1050 feet to twenty-five feet of the river on the water at the upper end, making just about 1075 feet from the water to the lower end here.

Cross-examination.

Q. (Mr. GRAVES.) You say it is 1050 feet to

(Testimony of J. C. Yearwood.)

within twenty-five feet of the river?

A. To within twenty feet from the water in the river.

Q. Now a change has been made in the place of diversion from the river. Now, how much up the stream did you go from the old place of diversion to the new one?

[123] A. Why, I would say probably 850 or 900 feet above that old intake.

Q. That is pretty close, is it?

A. Not to exceed that. You see, the lower end of the new intake strikes the old ditch away below the upper end of the old intake—quite a bit down. It made our ditch straighter and it put us a little bit further away where it was cutting us.

Redirect Examination.

Q. (Mr. BURR.) In a straight line it would not be that far?

A. No, it is a little crooked, but I was just a-going on the survey line that I helped Mr. Ellison survey, and it was just a thousand and fifty feet to where he said "Zero" up at the upper end. That was about twenty-five feet of the water.

Q. Is it pretty slow there or pretty swift?

A. That is not a steep grade.

Q. You have had some trouble with that ditch and with the current there, have you not?

A. No, sir, not trouble at all. All the trouble we ever had was to get water in it.

(Witness excused.)

Mr. GARRECHT.—The Government wishes to offer in evidence certified copies of the report of the progress of [124] stream measurements for the calendar year 1904, being water supply of irrigation paper number 135, pages 109, 110 and 111, the mean daily discharge of second-feet of the West Kittitas Canal, near Thorp, Washington, for 1904.

Mr. GRAVES.—I object to it on the ground that it is wholly incompetent; that there is no statement here as to the method of measurement and there is no statement by any person who took the measurements, and that these readings are objected to unless there is accompanied with them the oath of the party who made the measurements. And further, that conditions of the canal as to whether it was shut off because of repairs being made does not appear here. We should want to put in some sur-rebuttal as to that, to show that at the particular time we were not using the old canal that season because of the extension work we were doing.

Book containing pages referred to offered and received in evidence, and marked as Plaintiff's Exhibit "E" and returned and filed herewith.

Mr. GARRECHT.—We offer report of stream measurements for the calendar year, Department of the Interior, being water supply and irrigation paper number 178 and particularly page 55 referring to the West Kittitas Canal, near Thorp, Washington.

Mr. GRAVES.—That is objected to upon the same grounds as last above.

Book containing page referred to offered and re-

(Testimony of E. I. Anderson.)

ceived in evidence and marked as Plaintiff's Exhibit "F" and returned and filed herewith.

Testimony of E. I. Anderson, for Plaintiff (Recalled in Rebuttal).

[125] E. I. ANDERSON, recalled as a witness for plaintiff in rebuttal, testified:

Q. (Mr. GARRECHT.) Mr. Anderson, I call your attention to Plaintiff's Exhibit "E," being report of the progress of stream measurements for the calendar year of 1904, at pages 109-10-11, and ask you, Mr. Anderson, to examine that and state if that is the official government report to which you referred in the report which you made as to the water measurements in the West Side Irrigation Canal, in the report you made to Judge Graves?

A. I will state this, that in my report to Judge Graves I set out the record results of the company as made on the West Side Ditch for 1904 as given in water supply paper number 135, page 109, of the United State Geological survey, and that is the notation that I have in my report concerning this document. The document just handed me is water supply and irrigation paper number 135, and my attention has been called to pages 109-10--11 in this report, and on page 111 of this report I find a table purporting to give the amount of the daily discharge in second feet of the West Kittitas Canal, Thorp, Washington, for the year 1904, which I find upon comparison with the table as given in my report to Judge Graves that so far as I have examined it agrees with that substantially

(Testimony of E. I. Anderson.)

with that given in this paper, but evidently was not copied from the same paper, for the reason that in my report to Judge Graves the quantities were given apparently to the nearest tenth of a second-foot, while in the table here they [126] are given whole numbers only. I am at a loss to account at the present time for that discrepancy. What I intended to give him and supposed I had given, was a copy of water supply paper number 135. I have not found any substantial discrepancies; the differences occur, as, for example, in the table in the publication handed to me a moment ago, on the 4th day of July the discharge in that table is given as 43 feet; in my report to Judge Graves, in the table from which I copied it is 43.8; and the 5th of July, according to the Government publication handed, the discharge is 50 second-feet, while the table to him I find it is 49.6, and in looking over the tables I have not been able to find any greater discrepancies than that but it shows it is not exactly the same table for some reason or other, from which this was copied, but I am unable to—

Q. But you did refer to the Government report handed you, water supply paper number 135 and to this particular report?

A. It seems to be the same Government report, but there appears to be that discrepancy which I noticed, which makes me think it cannot be from the same table.

Q. I now call your attention to Plaintiff's Exhibit "F," being water supply and irrigation paper number 178, and particularly to page 55 thereof. I will

(Testimony of E. I. Anderson.)

ask you if that is a publication which was referred to by you in your report to Judge Graves?

A. That is a publication to which I referred to in my report to Judge Graves.

[127] Mr. BURR.—From the gauge heights, the daily gauge heights that were taken, you could compute those totals, with the other data given, could you not?

A. For the years for which the gaugings were made, for that particular use for which the gauging was applicable, yes.

Cross-examination.

Q. (Mr. GRAVES.) Mr. Anderson, you made this report for my information as to what the Government was claiming? A. Entirely.

Q. And you are not vouching for the authenticity of that matter at all, you know nothing about that?

A. This matter was simply given for your information as to where matter of that kind could be obtained. It was simply a reference.

Q. Just a reference, nothing else?

A. That was all.

Redirect Examination.

Q. (Mr. GARRECHT.) And that was to advise Judge Graves of the readings as published in the report of this West Side Irrigation Company's canal?

A. It was done pursuant to what I conceived an obligation to give Judge Graves all the information I could relative to that canal from the Government standpoint.

(Testimony of E. I. Anderson.)

Q. (Mr. BURR.) Mr. Anderson, I would like to have you look [128] over paragraph numbered 2 there on the first page of your report and see if the point you were not informing Judge Graves about was the actual amount diverted.

A. Which paragraph do you refer to, where I have formulated this matter in the form of a query?

Q. Yes, the points you intended to cover there in that one paragraph numbered second.

A. That paragraph was inserted by myself as a preliminary—it was laying a base to what I conceived this report should cover. I had not been asked that I recall now particularly by Judge Graves or anyone else to report upon the maximum quantity of water diverted from the Yakima River, but it was inserted for the purpose of laying a base upon which the report should follow, that is, and show that, if I was able to do it from the information I had.

Q. But you were not giving your best understanding and your best information upon the point as to what had been the maximum quantity of water diverted from the Yakima River by the company during in each year that had elapsed since the canal had been in operation? Is not that exactly what you were purporting to do, Mr. Anderson?

A. I was endeavoring to give Judge Graves—

Q. Can't you answer that question? Isn't that what you were reporting upon, just as it reads there, or were you reporting on something different?

A. Do you mean by that question that I incorporated in my report copies of these various tables in

(Testimony of E. I. Anderson.)

these publications as an answer to that question?

Q. Yes. Were you not giving that as your best information [129] on that subject?

A. I was giving it as all the information extant, but not for the definite purpose of showing these matters. It was giving him information as all the information extant; I could not have in mind that those things would constitute an answer to that particular question.

Q. You had no reason to question its correctness?

A. I have no reason to question it, but just the same I was not vouching for them.

(Witness excused.)

Mr. GARRECHT.—We now offer in evidence certified copy of water supply paper 291, surplus water supply of the United States, 1910, and calling particular attention to page 233 to The West Kittitas Canal, near Thorp, Washington—the report thereon.

Mr. GRAVES.—I object to this upon the same grounds; it is entirely incompetent; it does purport upon its face to give with any degree of accuracy the measurements.

Book containing page referred to offered and received in evidence and marked as Plaintiff's Exhibit "G" and returned and filed herewith.

Mr. GARRECHT.—I wish to offer in evidence three blue-print sheets, copies of original records in the office of the United States Geological Survey, and containing [130] results of stream flow investigations on West Kittitas Canal, near Thorp, Washington, for the year 1911.

Mr. GRAVES.—We object to this upon the ground that they are not the best evidence and wholly incompetent, and the same objections, without specifying in detail, as made to Plaintiff's Exhibits "E" and "F."

Blue-print sheets referred to offered and received in evidence and marked as Plaintiff's Exhibit "E," and returned and filed herewith.

Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).

PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Taylor you testified as to your qualifications yesterday, and I would like to ask you one question more. Are you in charge of all the hydrographic work of the Yakima Valley for the United States?

A. I am.

Q. The Reclamation Service is in charge of the hydrographic work now, is it, or the Geological Survey?

A. The Reclamation Service.

Q. Have readings been taken during the years that the evidence so far put in has covered with regard to—is there a complete set of readings throughout all those years? A. No.

[131] Q. Which years are lacking—since 1904, I mean?

A. The years lacking are 1906, 1907 and 1908.

Q. And we have put in all the official records available, have we, prior to 1909, in having put in 1904,

(Testimony of Paul Taylor.)

1905 and 1909? A. To my knowledge we have.

Q. Now, Mr. Taylor, with regard to water supply paper for 1905 being number 178; I would ask you whether the daily discharges into the defendant's ditch are given or not given.

Mr. GRAVES.—I object to his testifying to anything contained in that report on the same grounds I have stated before. I do not want to waive that objection.

A. There are no daily discharges given. There are three actual measurements given, made on June 30, July 10 and August 29, respectively.

Q. Are there gauge heights given, daily gauge heights? A. Well, for a portion of the season.

Q. Now then, from those daily gauge heights is it possible to determine the daily discharge of the other data there given? A. It is.

Q. Have you computed them?

A. I have them computed under my direction and looked over the datum myself.

Q. Checked the data? A. Checked the data.

Q. Can you state whether or not that gives the daily discharges that you so checked? A. It does.

[132] Q. Is this the sheet? A. It is.

Mr. BURR.—I would like to offer this sheet in evidence as Plaintiff's Exhibit "I," as the daily discharges for the year 1905 into defendant company's canal.

Mr. GRAVES.—I do not understand where he got this.

(Testimony of Paul Taylor.)

Q. (Mr. GRAVES.) Where did you copy this from?

A. I computed that from studies made in connection with these gauge heights and these measurements.

Mr. GRAVES.—We object to it upon the ground that it is based upon a report of which no proof has been made of its correctness.

Sheet referred to, offered and received in evidence and marked as Plaintiff's Exhibit "I" and returned and filed herewith.

(Witness excused.)

Mr. BURR.—That closes plaintiff's rebuttal, with the understanding that we are to call Mr. T. A. Noble, who has been quoted in the evidence, at the convenience of counsel.

Mr. GRAVES.—That is agreeable. I think I want to offer some testimony in rebuttal of your rebuttal testimony.

**Testimony of Mitchell Stevens, for Defendant
(Recalled in Surrebuttal).**

{[133] MITCHELL STEVENS, recalled as a witness for the defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Stevens, I wish you would state the condition of the canal, the West Side Irrigating Company's canal in the years 1904 and 1905, and what had caused that condition and what effect that condition had upon the flow of water into the canal during those years.

A. Also 1903, for that matter.

(Testimony of Mitchell Stevens.)

Q. Yes, state as to 1903, 1904 and 1905.

A. In 1903 and 1904 Sharp, Bradshaw & Coleman enlarged that ditch, but when they come to run the water in the ditch we found weak banks that would not stand the pressure and could not stand the pressure of a full ditch, and along about that time, maybe 1905, I can't just remember the date, there was one whole section of ditch—there was 800 feet of ditch that we put in a board bank into the ditch to make the bank hold, to make the bank stand, and also there was slides that kept coming into the ditch and troubling us so we couldn't get the required amount of water through, and the ditch was changed in two places and flumes put in to avoid those slides, and also the side hills in some places were cut down from—well, I should judge a hundred feet back on the side hill for to reduce the frequency of the slides.

Q. What did you do on account of those weak banks, what did you have to do as to the volume of water flowing in the stream during those years?

A. We could not run it to its full capacity. If we put [134] it up to its full capacity the weak banks would give way.

(Witness excused.)

Thereupon an adjournment was taken to some time to be hereafter agreed upon by counsel for respective parties.

[135] Federal Building, North Yakima, Wn.,
 9:30 A. M., March 22, 1915.

PRESENT—Mr. GARRECHT and Mr. BURR, for
 Plaintiff;

 Mr. GRAVES, for Defendant.

Continuation of proceedings pursuant to agree-
ment as follows, to wit:

**Testimony of T. A. Noble, for Plaintiff (in Re-
buttal).**

T. A. NOBLE, produced as a witness for the
plaintiff, in rebuttal, having been first cautioned
and duly sworn, testified:

Q. (Mr. BURR.) Mr. Noble, you were in what
employ during the year 1905?

A. United States Reclamation Service.

Q. In what capacity, Mr. Noble?

A. In 1904 and the spring of 1905 I was district
engineer for the State of Washington.

Q. Reporting to whom?

A. To the chief engineer, in Washington, D. C.

Q. What is your profession, Mr. Noble?

A. Civil and hydraulic engineer—was at that
time.

Q. Now in 1905 will you state what the activities
of the Government were, if any, in the Yakima
Valley, very briefly?

A. In 1905, I think in the month of April, we
started in to investigate, in a preliminary way, prac-
tically all of the projects and available projects tak-
ing water from the Yakima river and its tributaries.

Q. Were you doing any construction work?

A. No, sir.

(Testimony of T. A. Noble.)

[136] Q. Why not?

A. We had not yet decided what projects were feasible here in the valley, or whether any was feasible.

Q. Now what doubt was there with regard to the feasibility upon grounds other than engineering grounds?

A. The question of the right to take water for irrigation from the streams in the basin.

Q. There were other rival appropriators, you mean?

A. We had found the year before—I should state that the year before I had two men and one or two assistants with them, hired here locally, Mr. George Bliss, who was an engineer in the service, and Mr. George Harley—

Q. I do not believe we need all that, Mr. Noble. I want to make the record as brief as possible.

A. I was going to say they had found out in their investigations that all of the water of the Yakima river had been appropriated.

Mr. GRAVES.—I shall object to that.

Q. We do not need that, that has been stipulated, Mr. Noble.

A. Well, you asked me for the reason and I thought that was pertinent.

Q. It has been stipulated in the record that the secretary had required that certain conditions be met before the Yakima Project could be constructed. Will you state whether the Government, or rather what part the Government was taking in securing

(Testimony of T. A. Noble.)

these agreements from the various appropriators—what, if any, part the Government was taking in that matter?

A. The part that was taken was to put before the people here in the valley the necessity of settling definitely [137] the existent rights to certain definite quantities of water. The statement that was made by myself and the other engineers in charge here at that time was that no project could be undertaken in the valley until these various appropriators had all signed an agreement agreeing to limit their rights to such quantities of water that the total amount of all those claims as signed up would not be more than the water which flowed in the Yakima river. That is the substance of our position toward the water users.

Q. Did you go to Ellensburg for that purpose, Mr. Noble? A. I did, yes, sir.

Q. Did you meet the trustees or stockholders of the defendant in this case?

Mr. GRAVES.—Be definite as to whether it was the stockholders or trustees.

Q. Did you meet the trustees?

A. I am not absolutely certain. I recall definitely of meeting the stockholders of the Cascade Irrigation Company, the canal on the opposite side of the river, of which company Judge Kauffman then was their attorney, and the stockholders or the trustees of the West Side Irrigating company, I do not definitely recall a meeting with them as a stockholders meeting or as a trustees meeting. I met

(Testimony of T. A. Noble.)

quite a number of the stockholders and had talks with them, I recall that very distinctly.

Q. Was it at a public meeting at which the various stockholders and representatives of the West Side Irrigating company and other organizations were present?

A. Yes, sir. I asked for a public meeting through the Commercial [138] Club there where all of those interested in the diversion of water from the river would be present, and I addressed that public meeting and stated the position that the Government took in this matter, practically along the lines that I have stated.

Q. Now, Mr. Noble, with regard to these limiting agreements that were to be secured. Was the amount which was to be stated in the limiting agreement a definite figure or was it a varying figure; was it to be an appropriation, or was it to be an exact figure?

A. I didn't draw up the final agreement; I participated in the negotiations leading up to that agreement, but I could not testify as to who finally had that agreement signed; I didn't. The final negotiations leading up to the exact quantity of water that was put in that agreement, I didn't have anything to do with those final negotiations. The quantity of water which they would limit themselves to was pretty fully discussed, however, and my contention was, as I have stated, that in order for the Government to come in this valley and undertake a project it was necessary that the water rights all be confined

(Testimony of T. A. Noble.)

to a quantity that would not exceed the flow of the stream, and that if they signed for more than was actually diverted by them then somebody else would have to sign for less, and that it was up to them, the people as a whole and the committees, to determine what each could or would sign for.

Q. Was the final closing of that contract a matter that was up to the Government or up to the citizens committee?

A. It was first put before the Commercial Club here in [[139] North Yakima and they appointed a committee and we followed the same process there in Ellensburg. I believe there was a committee appointed there of which Judge Kauffman was a member, and our negotiations were largely through that committee, though we met and talked with the individual stockholders and with the ditch owners and we addressed them at public meetings, explaining as near as we could what the Government purposed to do and the conditions under which it would be possible and feasible for them to undertake the project.

Q. The amount of water stated in the limiting agreement, did you understand that that was to be a definite figure or was that to be an approximation merely?

A. I think I stated specifically at that public meeting that they would have to settle definitely upon a given amount of water that would be diverted by each of their canals and that would have to be such a figure in each case that the total would not exceed the flow of the river.

(Testimony of T. A. Noble.)

Q. The total aggregate of all the limiting agreements? A. Yes, sir.

Q. Did the Government in these negotiations, in so far as the Government made any overtures to the farmers in this matter, ever make any promise as to the construction of any particular unit on or before any date or during any period of time?

A. No, sir, not through me.

Q. Or through anyone who was present while you were present?

A. I was the only Government employee present there at that public meeting, and I think also at these stockholders [140] meetings, whatever they were, that I attended.

Q. Now, Mr. Noble, the amount mentioned in the limiting agreement signed in these various cases, and in particular the West Side case, was that to be measured at the river or was that the aggregate of measurements throughout the entire length of the West Side ditch?

A. The total quantity of water diverted from the river as measured by the representatives of the Reclamation Service that had certain gauging stations, one on each canal, and the quantity of water was determined at these gauging stations. Those gauging stations generally were as near the head of the canal as the conditions would permit. In selecting a gauging station it is necessary to select a place where the conditions are favorable to get an accurate measurement.

Q. What would be the effect upon the situation,

(Testimony of T. A. Noble.)

very briefly, if the limiting agreement was to be construed as mentioning a total aggregate figure composed of the total of the various diversions from the West Side ditch instead of a single diversion at the point of diversion from the river or near that?

Mr. GRAVES.—That is objected to as asking for the argument of the witness and as not calling for any fact.

Mr. BURR.—I will not press the question.

Q. When did you leave the service of the Reclamation Service? A. January 1, 1907.

Q. Were you afterwards connected with the United States Government in any of its branches?

A. No, sir, except that I was a witness at one time in [141] this room, the only time I was ever employed after that by the Government.

Q. Did you ever serve as water commissioner for the Yakima valley?

A. In the employ of the State; that is, I was paid by the county, but I believe it is considered a state appointment.

Q. When was that first, Mr. Noble?

A. For the season of 1908.

Q. And in that capacity did any member or trustee of the West Side Irrigating company have any conversation with you that you recall?

A. Yes, sir. I met Mr. Mitchell Stevens at that time and went over the situation with him there on his canal.

Q. Which canal do you mean?

A. The West Side canal. We went up to the head

(Testimony of T. A. Noble.)

of the canal with him and passed the Government gauging station there.

Q. How did you come to do that, Mr. Noble?

A. In my capacity as water master for this district.

Q. Water commissioner?

A. Water commissioner, yes, sir, as I believe it is called in the law.

Q. What was said at that time? Just the substance of it as far as you can recollect.

A. Mr. Stevens and I had other business together; I gave him some advice as to putting in concrete head gates; the most of our conversation was along that line. I don't recall that very much was said about their limiting agreement. I believe I did tell him that they were [142] diverting more than they had stated in that agreement, and I believe that Mr. Stevens told me that they felt that they had a right to divert more and they did not feel bound by that agreement. That is as near as I can recollect the substance of our conversation referring to this matter.

Q. Did you ever have any conversation with any member of the West Side Irrigating company, the defendant corporation, after the signing of that limiting agreement?

A. That was after the signing.

Q. Besides that conversation I mean.

A. Well, before I had seen Mr. Stevens I hunted up the—

(Testimony of T. A. Noble.)

Mr. GRAVES.—Just answer the question, Mr. Noble.

A. Yes, I did have a conversation with their ditch tender.

Q. When was that, when you were commissioner?

A. Yes. I think his name was Mr. Lee.

Q. While you were connected with the United States Reclamation Service did you ever have any talk with any of them after the agreement was signed?

A. No, sir. I thought you meant while I was water commissioner.

Q. Then while you were with the Reclamation Service you never had any conversation, except as you have referred to, conversations before the limiting agreement was signed, with any of the members of the West Side Irrigating company?

A. No, sir, I did not have any after that time. I left the service about that time or soon after that.

Q. (Mr. GARRECHT.) Then before you left the service you [143] never made any complaint to them that they were using too much water?

A. No, sir, I did not.

Q. That conversation occurred after you became a water commissioner? A. Yes, sir.

Q. And that was entirely in your official capacity as a water commissioner? A. Yes, sir.

Q. Did you have anything to do with these agreements after they were signed up?

A. I never saw them; I was not present at the execution of any of those agreements. I was in

(Testimony of T. A. Noble.)

the preliminary negotiations leading up to them, but the final signing of those agreements was out of my hands.

Q. In 1904, 1905 and 1906 you had charge of the Government work with reference to those streams?

A. I did, yes, sir.

Q. Did you know at that time how much water was being diverted by the West Side Irrigating company? A. Yes, sir.

Q. Could you state how much it was?

A. Yes, sir.

Q. (Mr. GRAVES.) Before stating how much it was would you mind stating how you know it, what means of information you had and whether it was personal knowledge on your part or something reported to you?

A. By the water supply papers published by the United States Geological Survey.

[144] Q. (Mr. GARRECHT.) And was that data compiled by you? A. Yes, sir.

Q. Then you may state what it was that they diverted.

A. In 1904 it was a trifle less than 70 cubic feet per second was the maximum amount, as shown by records of gauge height in the canal at the station; in 1905 it was very close to 75 cubic feet per second, taking even figures, and in 1906 I believe there was no station maintained there.

Q. (Mr. BURR.) Did you know W. J. Light-foot?

A. He was in my employ, yes, sir. That is, he

(Testimony of T. A. Noble.)

was employed under my direction, I should say.

Q. Will you state whether that (showing) is a photostat copy of Mr. Lightfoot's signature and figures. A. Yes, sir, that is his signature.

Q. And that sheet (showing)? A. Yes, sir.

Q. Is that part of the data that you referred to as having been taken on the flow of the steram?

A. Yes, sir.

Mr. BURR.—I offer the document in evidence.

Q. (Mr. GRAVES.) Mr. Noble, did you take any readings yourself on that canal?

A. A few, yes, sir. I was up there once or twice to check these measurements up.

Q. And this instrument that has been handed to you, that report is made up by a man in your employ?

A. Well, he was in the employ of the Government.

[145] Q. But under your direction?

A. Yes, he was under my direction.

Q. He made these readings himself, didn't he?

A. The readings of discharge he made himself, yes, sir.

Q. You yourself did not stay upon this canal and take these measurements

A. No, sir. He did it.

Mr. GRAVES.—I object to the document offered as incompetent as shown by the evidence of the witness.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "J" and returned and filed herewith.

(Testimony of T. A. Noble.)

Q. (Mr. GARRECHT.) Who was this Judge Kauffman that you referred to?

A. He was not a judge then, he was a lawyer in with Kauffman & Frost, and at that time he was attorney for the Cascade Canal that I know of specifically; whether he was for any other canals there at the time I don't know

Q. He was not in the service of the Government?

A. No, sir, not in any sense.

Cross-examination.

Q. (Mr. GRAVES.) You were in the service of the Government in 1906, Mr. Noble?

A. Yes, sir, up to January 1, 1907.

Q. In your capacity as district engineer of the Yakima Project you were interested in having the Government [146] come into this valley?

A. Yes, sir.

Q. And you were interesting everybody up and down through the valley to come under conditions so that the Secretary of the Interior would come into this valley with this project? A. Yes, sir.

Q. You made speeches at public meetings did you not? A. Yes, sir.

Q. You undertook to explain to the people the views that were entertained by the Reclamation Service and the secretary at that time?

A. Yes, sir.

Q. In the signing of these agreements were you willing they should put into these agreements an arrangement for more water than they had appropriated, or how were you limiting them? In other

(Testimony of T. A. Noble.)

words, what means did the Government have for limiting them?

A. That proposition was more or less left to the committees appointed by the Commercial Clubs to take this matter in charge, to act as a go-between between the Government and the appropriators.

Q. That is, you were not conveying any water to them, nor were they conveying any water to the Government? A. No, sir.

Q. Is that correct? You were simply trying to approximate—estimate—the amount of water which their uses required and which they were entitled to under their appropriation?

A. No, sir. I would not state it that way, no, sir.

[147] Q. How would you state it in that regard, Mr. Noble?

A. All the statements that I made at these public meetings and to the individuals and every one else in this valley, was on the basis that I have previously stated in this testimony, that they must sign for such amounts, each one, so that the aggregate amount of all these signed agreements would not exceed the total flow in the river.

Q. Did you expect any one of these water users to relinquish any water they had actually been using? A. No, sir, I didn't expect them to.

Q. Let me put it this way: Was it not a fact that you wanted each one of those water users to state the water he had been using, so far as he knew and so far as you knew?

(Testimony of T. A. Noble.)

A. We didn't need to have them state because we had measured that.

Q. You knew then, did you, the amount of water?

A. That they had actually used in 1904 and 1905.

Q. They were using 80 second-feet in the West Side canal in 1904 and 1905. A. No, sir.

Q. Why did you expect an agreement limiting it to 80 cubic feet? A. I didn't expect it.

Q. You did not know anything about that?

A. I did not know anything about the final limitation, as I said.

Q. You knew that in the condition of the canal in 1904 and 1905, on account of recent changes in it, it would not [148] carry the full amount of their original appropriation?

A. I didn't know that. I knew the actual condition of their canal personally.

Q. A cubic foot or a second-foot of water means the amount of water that will flow through a cube with a section one foot *one foot* square in one second of time. A. Yes.

Q. That is correct, is it?

A. That would be a flow of one cubic foot per second.

Q. And a miner's inch or a statute inch is determinable by the various pressures to which the water is subjected; that is true, is it not?

A. Yes, it varies with the pressure and also with the nature of the orifice.

Q. The most convenient method and the one most generally adopted is the amount of water that will

(Testimony of T. A. Noble.)

flow through a thin-edged orifice one inch square, with a pressure of four inches over the center of the opening. That is the method of measurement usually adopted, is it not, Mr. Noble?

A. Why, I don't think so. It used to be generally adopted as a method, but there were all sorts of variations as to the pressure.

Q. That is the method known as measuring water under pressure. A. Yes.

Q. And measuring 50 inches or 50 inches measured under that kind of pressure exactly equals one second-foot?

A. Not exactly. It depends on the pressure.

Q. That is what I say, 50 inches measured under a four-inch [149] pressure over the center of the opening exactly equals one second-foot.

A. This is, I believe, the relation prescribed by law in one or two of the western states, I do not know just how many.

Q. The point is, not as to your actual recollection as to the law, but—

A. But that is all I know about it.

Q. Well, I say 50 inches of water measured in that way exactly equals one second-foot, does it not?

A. Not necessarily.

Q. Under 4-inch pressure?

A. Not necessarily. It depends on the nature of the orifice.

Q. Exactly so.

A. If the orifice has rounded edges, why, there will be a larger quantity of water than if it has

(Testimony of T. A. Noble.)

square edges and so forth. That is why I say that.

Q. When I say to you though without qualification as to those points, when I say to you that an orifice one inch square, with a pressure of four inches over the center of the opening, other things being equal, that measures what is sometimes called an inch of water? A. Yes, sir, it does.

Q. And 50 inches of that water will exactly equal one second-foot, will it not?

A. Well, for practical purposes, yes, sir.

Q. And 4,000 inches of water so measured would mean 80 second-feet? A. Yes, certainly.

[150] Q. How do you suppose that 80 feet was agreed on up there; have you any idea about it, Mr. Noble? How did they happen to hit on 80 feet?

A. As near as I can recall something was said there, either between myself and some of the members of the West Side Irrigating company or somebody else, that they needed 4,000 miner's inches of water in their canal.

Q. That was the idea about that?

A. Yes. That is about all I recollect anything about.

Q. And 4,000 miner's inches would be understood to mean 80 second-feet, wouldn't it?

A. Well, I don't know what their pressure was.

Q. Oh, no; but I say in talking—

A. It would under the pressure you mentioned—for practical purposes it would.

Q. But in talking like that in public to those people— A. Yes.

(Testimony of T. A. Noble.)

Q. —and they would say that they wanted 4,000 inches of water you would immediately say that meant 80 second-feet, wouldn't you?

A. Well, I would want to know first what their pressure was, and I didn't know what their pressure was.

Q. You don't get down so technical, do you, when you are addressing a public meeting?

A. Well, I am perhaps a little more technical, Mr. Graves, than a lawyer would be there because that is the first thing that would pop into my mind, as to whether the conditions were a 4-inch pressure or 1-inch pressure or what the conditions were that would develop this.

[151] Q. I want to get at this idea, Mr. Noble. Instead of making a contract with these people you were going around holding public meetings to influence public sentiment to making a public agreement along certain lines that you have mentioned.

A. Well, I don't think exactly that, Mr. Graves. My object in going up there was to get in touch with those people and explain to them the position of the Government regarding a project in the valley, and urge upon them the necessity of settling their water rights.

Q. You know that this question of water rights was always a matter of approximation, do you not, as to how much water anybody was entitled to? Now take the Sunnyside; nobody knew the amount that the Sunnyside was entitled to at that time.

A. Oh, yes.

(Testimony of T. A. Noble.)

Q. You never had any agreement with the Sunnyside, did you?

A. I know the United States purchased the Sunnyside canal in order to avoid that difficulty. That purchase was made as a point in the settlement of the water right question in this valley.

Q. That was arbitrarily fixed at 650 second-feet.

A. That was the amount determined at that time.

Q. And the amount to go to the Indian country over there, the Wapato unit, was arbitrarily fixed at 147 feet.

A. Yes. But that was the amount actually diverted at that time.

Q. Yes; that is to say, after somebody had cut away the dam there that was turning water into the Indians canal, in August, 1905, when there was the least flow in the [152] Yakima river, you measured and found only 147 second-feet running into the Indians canal.

Mr. BURR.—I object to that question; it is immaterial to this question entirely. There is no use putting in a long record concerning this entire water right of the valley in connection with this defendant's water right.

Q. Now you may answer that question. The measurement was taken in August, 1905, was it not?

A. I don't recall. There was a measurement made in 1905 and 1904.

Q. Now you may answer the first question. (Question read.)

A. There were two Indian canals and that was

(Testimony of T. A. Noble.)

the total measurement during the low water season of those two canals.

Q. You recall the matter of the litigation over the water rights in 1905, don't you, Mr. Noble, brought by the Prosser Falls Land & Power company? A. Yes, sir, such litigation was started.

Q. When did the Government commence construction work under this Yakima Project—after you left the Service or before?

A. It was started after I left the Service.

Q. When did it commence, do you know?

A. Well, I couldn't state definitely.

Q. Where was the first work done, so to speak?

A. I believe the first construction work was on the Tieton Project and in the construction of roads. I think that was probably some time during the late summer of 1906.

Q. The fact is, after these agreements were signed in order for the Government to come into the Yakima valley, [153] the Government had to take over the Sunnyside canal? A. Yes, sir.

Q. You had to reduce the amount of water going into the Indians canal to 147 second-feet to come within the rule, didn't you? It had to be that low, didn't it?

A. Well, the general plan was, so far as all the appropriators were concerned, that taken as a whole they should confine themselves to the amount actually diverted prior to the time the work was actually begun. Now, if any one signed for more than he had

(Testimony of T. A. Noble.)

actually diverted some one would have to sign for less.

Q. Yes, I understand that. But in the summer of 1905 the Indian canals were only taking 147 cubic feet.

A. That was it, yes, sir, approximately, as near as—

Q. The whole purpose of everything you did that year in taking over this Sunnyside project was to commence work on the Tieton unit, was it not? That was to be the initial work, was it not?

A. That was decided, I believe, to be the first work undertaken.

Redirect Examination.

Q. (Mr. BURR.) Had they decided to undertake this work before the agreements were all in, Mr. Noble?

A. I think not, no, sir. As I said, during 1906 I was nearly all the time either working on the Priest Rapids project or the final surveys of the Tieton Project, and I had very little to do with the negotiations leading up to the final settlement of those water rights, [154] which occurred, I believe, along in the latter part of 1905 or fore part of 1906, and just when each one of them was signed I could not state. I became somewhat familiar with it as a water-master; that is, I made a record of it as water-master, but I do not know now when those dates occurred.

Q. (Mr. GARRECHT.) Mr. Noble, did the Sunnyside company sign up any of those agreements?

(Testimony of T. A. Noble.)

A. You mean the Washington Irrigation Company?

Q. Whatever it was—this Sunnyside project.

A. The Washington Irrigation company did not. That company did not sign any agreement at all as far as I know. They sold their canal to the United States.

Q. And at the time these other water users on this stream were signing those agreements did you have any option for the purchase of this Sunnyside canal?

A. I did, yes, sir, through Mr. Blaine.

Q. For the Government, you mean?

A. For the Government. That deal was first negotiated in Olympia in the spring of 1905.

Q. Did you ever tell any of the officials of the West Side Irrigating Company that if they needed any more water than they limited themselves to by the agreement with the Government, that the Government would be furnishing it?

A. I have no recollection of doing anything of the kind.

Q. Did you ever tell any of the members of that company that they would have to, or demand of them that they buy stored water?

[155] A. Why, I don't recall that I did. I do not think it is hardly possible that I could have made such a statement for the reason that the Government at that time did not have, or at least we did not have, any authority, nor the Secretary of the Interior, nor Congress, had not given us any authority to sell water from those reservoirs.

(Testimony of T. A. Noble.)

Q. Was the Government any more anxious to undertake this project than these people, the waters users along these streams, were anxious to have the Government go into it?

A. There seemed to be great anxiety all up and down the valley to have the Government come in here, and it was on the strength of that desire on the part of the people that induced us to go in.

Mr. GRAVES.—Of course I object to all this so far as being immaterial and incompetent.

Q. And how was it with the West Side Irrigating Company people; was anything done or said to indicate how they felt about it?

A. Why, I don't recall just what was said about that. I know we had a good deal of talk about the construction of the High Line canal, and I know, too, that I was asked that if these agreements were signed if the Government would undertake the construction of that project, and I know, also, that I did not make any direct or definite promises that the Government would do so. I did state that I had made a preliminary investigation of the project and that it was feasible, but that it, however, was a larger project, that is, took more money [156] than there was available in the reclamation fund at that time, and that whether it would be constructed in the future would depend upon its feasibility as determined by the board of engineers or the chief engineer. I think that is, in substance, the answer I gave to that query.

Q. (Mr. GRAVES.) Mr. Noble, since we have gone into that matter of the people being anxious,

(Testimony of T. A. Noble.)

from whom did you get instructions to proceed in the matter of initiating this Yakima Project—from whom did your instructions come? A. From Mr. Newell.

Q. As the director of the Reclamation Service?

A. He was chief engineer then.

Q. And he directed you to start in and get this project in shape? A. The first move, Mr. Graves—

Q. I am saying he directed you; didn't he?

A. If you desire me to tell the actual facts regarding the beginning of this thing I will do so.

Q. If you fully know "the actual facts" I suppose you know the political inside of the whole thing, don't you?

A. There was no political inside connected with it as far as I am concerned.

Q. You asked me if I desired to know the actual facts, but if you do not know them I am not going to probe you about them.

A. I do know them, and if you desire me to I will tell you.

[157] Q. You know very well it was the influence of Senator Jones at Washington that started the Teilton Project, near North Yakima, don't you?

Mr. BURR.—I object to the question.

A. I don't know anything of the kind.

Q. All right; you say you don't know anything about it. A. I don't believe that was so.

Q. You got your directions directly from Mr. Newell?

A. Yes, sir. I was on the board of engineers at the time.

(Testimony of T. A. Noble.)

Q. And the moment you got your instructions from Mr. Newell you started on a campaign up and down the valley making speeches to these people, didn't you? A. I did.

Q. (Mr. GARRECHT.) As counsel will not let you state how this started, I wish you would state exactly how that started, Mr. Noble.

A. The engineers of the Reclamation Service had determined that the Palouse Project was not favorable for the Government to undertake, at least at that time, and there was serious question as to whether there was any project in this State which could be undertaken. In the winter of 1903 I went to Portland where Mr. Newell was at that time, for the purpose of getting his consent to undertake a preliminary survey of the water conditions of the Yakima valley for the purpose of getting the water question settled here, and he gave his consent, and I sent Mr. Bliss and Mr. Harley over here for that purpose, and in 1905 we started these investigations as to the feasibility of all these projects. The [158] board of engineers, consisting of myself and Mr. Henny and Mr. Wiley and, I think, Mr. Quintin, sat here in North Yakima to determine which one of these projects it was feasible to undertake, and it was decided at that board meeting that we must purchase the Sunnyside canal and that there was not sufficient funds to undertake the Kittitas Project, which was known as the High Line Project at that time, and for those reasons I know, as far as those engineers were concerned and

(Testimony of T. A. Noble.)

myself, that that is why the Tieton Project was approved.

Q. (Mr. GRAVES.) Who called that board together? Who caused that board of engineers that you spoke of to meet?

A. The director and chief engineer of the Reclamation Service.

Q. At Washington?

A. At Washington, yes, sir.

Q. In other words, you followed in all of these matters instructions from Washington, didn't you?

A. Yes.

Q. You had no power yourself to do it?

A. Oh, no, not to decide these matters at all, except as being a member of this board of engineers.

(Witness excused.)

Testimony of William C. Muldrow, for Plaintiff (in Rebuttal).

[159] WILLIAM C. MULDROW, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. BURR.) What is your business?

A. Civil and hydraulic engineer.

Q. How long have you followed that?

A. All my life; about 12 or 13 years in active practice.

Q. Mr. Muldrow, were you taking measurements or reporting to the Geological Survey in 1905 in the Yakima Valley? A. I was.

Q. Will you state whether this photostatic copy

(Testimony of William C. Muldrow.)

which I offer you, appearing upon the third of those attached sheets, is a photographic reproduction of your handwriting, signature and figures. A. It is.

Q. When was that taken, Mr. Muldrow?

A. On August 29, 1905.

Q. What was it?

A. It was a gaging, current meter gaging, of the West Side or West Kittitas canal.

Q. What results were arrived at as a result of that gaging?

A. The results of this gaging show that on that date, at the gaging station just above the town of Thorp, with the gage standing at 2.55 feet, the canal discharged 73.7 second-feet of water—there was that amount flowing in the canal.

Q. Will you recite particularly the method of obtaining daily discharges into the West Side Irrigating Company's canal as a result of that gaging?

A. This gaging is a part of the process necessary to obtain a season's record. Do you wish me to—

[160] Mr. BURR.—I wish to state for the benefit of counsel, we will put on the stand the observer who took these daily gagings and made the readings. This witness did not take the gagings himself, we will prove them by other witnesses.

A. (Continued.) The object of course is to have a complete record of the amount of water flowing in the stream under consideration throughout whatever period is desired. Here we wanted the flow in this irrigation canal from the time it was turned on in the spring until it was turned off in the fall.

(Testimony of William C. Muldrow.)

Q. How were those objects obtained, Mr. Muldrow?

A. Reading stations were selected as near the head of the ditch as was practicable to get a section that would admit of accurate determination. Such section was—

Mr. GRAVES.—I think I shall object to this if there is no showing by the witness as to where they were actually placed. I object to any statement in general terms as to what they desired to do, and insist that the exact location and the actual readings be shown by the man who made the observations.

A. (Continued.) Well, it was my duty to obtain the data as a whole; this measurement is one step in the process. I had charge of maintaining that station and supervising the observer and of receiving his daily reports, copying them into records and—

Mr. GRAVES.—Let me ask him just one question: What you got was the report made to you and then you made up the results from the report of the observer; is that correct?

A. From his reports and my own observation. When I made [161] the actual gagings I checked his reading for that day.

Q. (Mr. BURR.) Now, irrespective of the observations, which we will prove by another witness, taken in connection with the gagings which you have there, how were the results reached in terms of daily discharge into that canal?

A. Taking these observations I have here in connection with other observations of the same kind,

(Testimony of William C. Muldrow.)

made during the same season, and all being made carefully and accurately with standard instruments whose accuracy is investigated from time to time, we plot these actual determinations on cross-section paper, check them up and arrive at the rating table or curve which will show the amount of water flowing at any given height on the gage; then taking the observer's daily records, the accuracy of which is checked up by myself in this case whenever I go there, several times during the season, we tabulate those results and sum them up.

Q. Now using that as your custom, was that followed with regard to the 1905 figures?

A. Absolutely.

Q. By yourself? A. By myself.

Q. And by the observer? A. Yes, sir.

Q. How much variation of error or how large a proportion of error is there in connection with those figures?

A. There are several sources of possible error. All of them, except one, would be what we term—

Q. (Mr. GRAVES.) Well, there is not any great error, is [162] there? A. No.

Q. How much? That is what counsel wants to get.

A. The error is probably one or two per cent; if it exceeds three per cent it is easily detected.

Q. (Mr. BURR.) In connection with this actual work, in June, 1905, was that done with the kind of appliances that you refer to as being scientific?

A. It was.

(Testimony of William C. Muldrow.)

Q. Done with a current meter, in part?

A. Yes.

Cross-examination.

Q. (Mr. GRAVES.) Where was your meter, Mr. Muldrow, at what point?

A. At what point in the section, do you mean?

Q. On the West Side, yes.

A. In this particular case I think that my notes show that I divided up the canal, which was fifteen feet wide, into six sections and I took two observations at each of two points in each section.

Q. Which was the nearest section to the intake—at what particular point? Was it the flume?

A. You mean the gaging station?

Q. Yes. At what particular point was the gaging station?

A. The gaging station was at the road crossing, about a mile above the town of Thorp and about a mile and a half from the head of the ditch.

[163] Q. That was in the flume?

A. No, it was in earth section.

Q. It was not in a flume? A. No.

Redirect Examination.

Q. (Mr. GARRECHT.) Mr. Muldrow, you are not now in the service of the Government, are you?

A. No.

Q. When did you sever your connection with the Government? A. In 1909.

Q. And since that time you have not been employed by the Government in any way? A. No.

(Witness excused.)

Testimony of Margaret Lechman, for Plaintiff (in Rebuttal).

[164] MARGARET LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. BURR.) Miss Lechman, where were you living in 1904 and 1905?

A. At Thorp, Washington.

Q. On what ranch were you living at that time?

A. The Lechman ranch.

Q. Did you take some observations upon the West Side Irrigating Company's canal? A. I did.

Q. Will you state whether that is your handwriting there (pointing at the figures and writing shown as by Maggie Lackman)? A. Yes.

Mr. BURR.—I offer the document in evidence.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "K" and returned and filed herewith.

Q. Occasionally your family spelled their name two different ways, did they?

A. No, they did not, but in going to school the teachers always spelled it that way and I got to signing it that way, but L-e-e-h-m-a-n is correct and it is used by the folks all the time.

Q. Now, Miss Lechman, when you took these observations you may state whether or not they were always taken with care. A. I did.

Q. Were they taken on the exact date that they show in the report they were taken on?

A. Yes, sir, they were.

(Testimony of Margaret Lechman.)

[165] Q. Do you or do you not think it was possible for you to read the rod as close as the report shows it was read? A. It was, yes, sir.

Cross-examination.

Q. (Mr. GRAVES.) How did you come to take these readings?

A. Why, my brother was taking the ditch markings and when he didn't have time I would take them for him.

Q. All you know about it is what he told you?

A. Yes, he showed me, and many times he would go after me to see if I did take them right.

Q. Where was this gauging station?

A. It was right there on our place.

Q. Yes, but to get it a little more definitely, how far was it from Thorp? A. A mile.

Q. Directly west of Thorp at that bridge?

A. At that bridge.

Q. You know nothing about the condition of the ditch near there, do you? A. I don't understand.

Q. Do you know about it beginning to be pretty full of mud just above there? Don't you recall that in 1905 it caved in? A. I couldn't say for sure.

Q. You don't recall that definitely? A. No.

(Witness excused.)

Testimony of Thomas Lechman, for Plaintiff (in Rebuttal).

[166] THOMAS LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

(Testimony of Thomas Lechman.)

Q. (Mr. BURR.) What is your business, Mr. Lechman? A. Ranching.

Q. How long have you been ranching?

A. 14 years.

Q. How long have you ranched at the Lechman ranch, in Kittitas valley, near the West Side Irrigating company's canal? A. About 10 years.

Q. When did you go there?

A. Well, about 14 years this month since I come in there.

Q. Do you recall an enlargement of the West Side Irrigating company's canal after the Milwaukee railroad went through, or after its grading?

A. Yes, sir.

Mr. GRAVES.—I object to counsel's using the word "enlargement" in asking these questions.

Q. At the time the improvement referred to was put through was that or was that not an enlargement of the West Side Irrigating company's canal?

A. You mean how much larger?

Q. Yes.

A. Well, I couldn't say exactly. It looks to me about two feet.

Q. Two feet on the bottom width? A. Yes.

Q. Was that all the way through your place, Mr. Lechman?

A. Yes. About two feet on the bottom.

Q. Did they deepen it? [167] A. Yes.

Q. How much?

A. Well, I don't know; I couldn't say for sure; it looks to me like about seven or eight inches.

(Testimony of Thomas Lechman.)

Q. All the way along through your place?

A. Yes.

Q. Did they do the same work on the ditch in the other localities near you?

A. Well, I don't know. They been working, I don't know what they done.

Q. Did they do that down through Page's place?

A. No.

Q. Did they do that up above you? A. Yes.

Q. How far would you suppose, that you actually observed yourself?

A. Well, I don't know; it was about two miles, I guess. I don't know exactly how far because I never went there. I know over there on my place, but I don't know—

Q. That was not merely a clearing out of old slides, was it, Mr. Lechman? A. What's that?

Q. That wasn't just merely that they cleared out old slides into the ditch; that was an enlargement clear through, was it?

A. Yes, they went right through.

Q. Made it bigger than it ever was before?

A. Yes.

Mr. GRAVES.—Let him state what they did.

Q. After they got through with this ditch was the ditch [168] able to carry more water than it had been able to carry before or less?

A. Well, I guess it carried more water. I don't know how much.

Q. Are you sure it carried more water?

A. It bound to, they made it bigger.

(Testimony of Thomas Lechman.)

Q. Would it carry more water after they got through, I mean, than it ever carried before?

A. Well, I don't know. I never measured water, of course.

Q. Is it your opinion that it did or not?

A. Well, I believe it carried more water or else they wouldn't fix it. I don't know if they put more water in or not.

Cross-examination.

Q. (Mr. GRAVES.) These flumes measured about the amount of water that ditch would carry, as a regular thing, didn't they? A. Yes.

Q. The flumes, I say, that were along the canal, they would measure about the amount of water the ditch would carry?

A. You mean right where it was measured?

Q. No, the different flumes. You know where the different flumes were.

A. Well, I don't know. I never been through.

Q. Did you ever see the Gordon flume?

[169] A. No.

Q. Ever see the flume at Yearwood's place?

A. No, I never seen the flume there.

Q. Never saw the Ellison flume?

A. No, only the flume at my place. That was widened up.

Q. There at your place for a little bit, to keep the dirt from sliding, they pressed the dirt into the bank, didn't they? A. Put it right down in the bank.

Q. Put it right down there to keep it from sliding?

A. Yes.

(Testimony of Thomas Lechman.)

Q. This work that you refer to, Mr. Lechman, as having been done at your field, that was done in 1909, was it not?

A. Well, I can't say for sure, only I know it was after the Milwaukee went through.

Q. What year did the Milwaukee go through?

A. I don't know.

(Witness excused.)

Mr. GARRECHT.—We will offer in evidence this certified copy of a contract and two mortgages by the trustees of the West Side Irrigating Company to show that they were engaged in making contracts of a similar nature.

Mr. GRAVES.—The two mortgages I do not object to, but I object to the contract or agreement with C. A. Splawn being received in evidence in as much as that agreement was made and entered into for the purpose of settling differences between the company and other parties long prior to any interest the United States had.

[170] Agreement referred to offered in evidence and marked Plaintiff's Exhibit "L"; mortgage from company to The Barnes and McCandless Company marked Plaintiff's Exhibit "M"; mortgage from company to William Brown marked Plaintiff's Exhibit "N," and all returned and filed herewith.

Mr. BURR.—I will offer and read in evidence from the record of the stockholders' meeting of the West Side Irrigating Company, which shows, under date of April 1, 1905, the following:

"Motion by W. A. Stevens, seconded by J. N.

(Testimony of Thomas Lechman.)

Burch, that the stockholders of the West Side Irrigating Co. make claim to the Government Reclamation Bureau to four thousand inches of the waters of the Yakima River, and the Board of Trustees to notify Splawn and Ellison to make their claim to water to flow through the company's canal, and in case they do not make their claim the Board of Trustees to claim a thousand inches for Splawn and Ellison. Carried."

I would like to have the record show, also, that the words "four thousand" is a change, the original record appearing "thirty-five hundred."

Mr. GRAVES.—No. It may show that "thirty-five hundred" is erased and "four thousand" written in, but not that there is a change in the record, because we will show that the record before it was approved was as it reads there, "four thousand" and not "thirty-five hundred."

Mr. GARRECHT.—We will offer it with your explanation.

Mr. GRAVES.—I will concede that the testimony of George F. Harley would be the same as to plaintiff's proposed exhibit "O," and that the testimony of W. J. Lightfoot with regard to the first and second photographic sheets of Plaintiff's Exhibit "J" would be the same, as Mr. Muldrow's testimony has been with regard to the third sheet of the said exhibit "J."

[171] Mr. BURR.—Pursuant to that admission we will not offer in evidence certified photographic

(Testimony of Thomas Lechman.)

copy of gaugings made by George F. Harley of the West Side canal.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "O" and returned and filed herewith.

Mr. BURR.—We have no other witnesses here at this time, we will only have about two more, and I suggest that you proceed with your surrebuttal at this time, if that is agreeable to you, and we will call our witnesses when they come.

Mr. GRAVES.—Yes, I have some testimony that I can put in at this time.

Testimony of Carroll B. Graves, for Defendant (in Surrebuttal).

[172] CARROLL B. GRAVES, produced as a witness for defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

The matter that I am going to testify to will not be contradicted and might well go in as a stipulation. If it is contradicted I shall withdraw my testimony upon the point.

The Wapato Unit of the Yakima Project; there is no bill pending in the Congress for the appropriation of money to build canals and furnish water to the Yakima Indian Reservation; there was a recommendation by a committee appointed by the Congress that that be done, and Congress, in August, 1914, appropriated one hundred thousand dollars for that purpose, but at this last session of the Congress, ending on March 4th, there was no appropriation made for it.

(Testimony of Carrol B. Graves.)

There was a contract between the United States and the Kittitas Reclamation District by which the District was to pay the Government twelve dollars and sixty cents per acre for water to irrigate the lands within that district, that amount being assumed to be the actual cost of the storage of water for that purpose. That contract has expired by limitation of time and is not now in existence; it may or may not be renewed, depending upon the abilities of the District in the future.

I am acquainted with the Yakima Project as a whole. The only works now being carried on by the Government in the way of irrigation is through its Tieton Unit and Sunnyside Unit.

You may cross-examine.

[173] Cross-examination.

Q. (Mr. BURR.) You are familiar with the provision for the irrigation of portions of the Wapato Unit within the Yakima Indian Reservation recently made by the Congress, are you not?

A. What do you mean by "recently made"?

Q. Made by Act of Congress as part of the Indian Appropriation Bill passed by the last Congress.

A. In August, 1914?

Q. Yes. A. Yes.

Q. Do you recall what tracts of land are proposed to be irrigated under that provision so made?

A. Yes. They follow the recommendation of the commission.

Q. What are they?

(Testimony of Carrol B. Graves.)

A. That substantially 120,000 acres to be taken care of. But for that work the Congress only recommended that six hundred and thirty-five thousand dollars be appropriated in payment for water.

Q. It was the theory, was it not, that free water was being furnished for 40 acres of each Indian's allotment?

A. One-half of each allotment, whatever the acreage might be.

Q. The provision, then, that was made by the appropriation so initiated, not all actually appropriated at the time, was for the irrigation of a portion of each allotment scattered over the entire area—was it or was it not?

A. The assumption, Mr. Burr.

Q. The supposition was that the other portions of these [174] allotments were or were not to be irrigated eventually?

A. They were to be irrigated.

Q. The entire area was to be irrigated?

A. That was the theory. I might say we have abandoned it now, like most of these other things. We know that the Government will not come through with it in time, and the theory down there now is, I might say, to have the irrigation proceed under other agencies than the Government agencies, if we can do it. That is to say, Mr. Burr, when Congress only appropriated one hundred thousand dollars last year and when they refused to make any appropriation this year, the people holding lands under the Wapato Unit lost faith in ever getting their lands irrigated

(Testimony of Carrol B. Graves.)

through that source—it would be too far in the indefinite future.

Q. Would they purpose putting in their own storage works? A. Oh, no, buy it, sure.

Q. They would continue to look to the Government for their supply??

A. As long as the Government occupies the field, yes.

Q. The Kittitas Reclamation District is an existing organization, is it? A. Oh, yes.

Q. It remains in existence for what purpose?

A. To get water from the Government whenever we pay them for it; they won't furnish it to us until we can.

Mr. BURR.—That is all.

[175] Redirect Examination.

The point that I was making in my testimony—I have to re-examine myself a little bit, Mr. Burr—was that the works inaugurated by the Government in 1905, speaking of the stipulation there in which it is stated that many millions of dollars were appropriated for this purpose, that after the work which they attempted to undertake they put in operation only the Tieton to the extent—

Mr. BURR.—I object to this; it is in contradiction of the stipulation we entered into.

I am not contradicting it, because the contract with the Kittitas Reclamation District was in existence when we made the stipulation—that the work which

(Testimony of Lewis F. Ellison.)

the Government assumed to undertake put in operation only the Tieton and the Sunnyside.

(Witness excused.)

Testimony of Lewis F. Ellison, for Defendant (in Surrebuttal).

[176] LEWIS F. ELLISON, produced as a witness for the defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GRAVES.) Mr. Ellison, where do you reside?

A. At Thorpe, Kittitas County, Washington.

Q. How long have you resided in that community?

A. About thirty-five years.

Q. What is your business, generally speaking?

A. Farming and milling as a general business.

Q. You have done some civil engineering and contracting? A. Yes, sir.

Q. Are you acquainted with the West Side Irrigating Company's canal? A. Yes, sir.

Q. When did you first have anything to do with that canal?

A. In 1889, in the beginning of the construction of the canal.

Q. What did you do in 1889 in connection with it?

A. I had a contract with Mr. Sharp and Mr. Stevens, the manager and secretary of the company at the beginning of the organization, to construct flumes and bridges all the way through the lands ditched.

Q. In what ways were those flumes constructed?

A. The flumes were known by numbers; com-

(Testimony of Lewis F. Ellison.)

mencing at the head, that is, the first flume below the head gate was in number one, the next one number two, and so forth on down. Number 1 was put in of timber 18 feet, but the flume was 16 feet less two inches on each side—two planks on each side; that would make it 15 feet 8 inches of flume.

Q. (Mr. GARRECHT.) Was this contract in writing?

[177] A. Yes, sir. I have a copy of the contract.

Q. Will you let me look at it?

A. (Producing a document.) That is a copy of the original contract.

Q. (Mr. GRAVES.) Now, you gave the dimensions of number 1? A. Yes, sir.

Q. Is that what is known as the Gordon flume?

A. It is the Gordon flume, yes, sir.

Q. What was the next flume, Mr. Ellison?

A. The next flume is in Mr. Hutchinson's field.

Q. Number 2? A. Yes.

Q. Can you give the dimensions of that flume?

A. That was 2 feet less; that was 14 feet minus a 2-inch plank on each side again.

Q. Go right along down the ditch.

A. The next flume was what we called the Pardee flume, a short distance below. That was the same size.

Q. (Mr. BURR.) That was the same size under that contract you mean.

A. That was built the same size the time I put it in, yes.

Q. That was not done under the contract, was it?

(Testimony of Lewis F. Ellison.)

A. Yes, that was under the contract.

Q. The contract does not call for a flume of that dimensions or any other dimensions, does it?

Mr. GRAVES.—I am asking him what size he built them.

Q. (Mr. GRAVES.) You built those flumes under the contract with the company?

A. Yes, I built those flumes under contract.

Q. And you are giving the size you built them?

[178] A. The contract did not specify the size of the flume, but the contract specified that I should build them according to the instructions of the engineer in charge.

Q. Now go on to number 3.

A. That was number 3, at Yearwood's place.

Q. And the next flume?

A. Is in Mrs. Ellison's field.

Q. Just go on down. How many did you put in?

A. There was a crossing under the county road, but it was not called a flume, it was an underground crossing, but I marked it "flume" at that time. There is no flume there at the present time, nothing but the bridge; we made a flume and the road went over and that was changed into a bridge, but that would make no change in operation. The next number then would be number 5 at Packwood's place, now known as the Packwood place. There the flume was changed, the same size of flume on each side and then an offset put in on each side, making the flumes smaller as we went down.

Q. That is, as you went down towards the end of

(Testimony of Lewis F. Ellison.)

the canal you reduced the flumes in size?

A. Reduced the flumes in size.

Q. Have you any acquaintance with those flumes in later years, Mr. Ellison? A. Yes.

Q. When?

A. I had a contract in 1904 in placing one in Hutchinson's field—1904, I think.

Q. What have you to say as to the size of the flumes in 1904 as compared with the way they were in 1889?

[179] A. They were the same size.

Q. Are they the same size now?

A. They are the same size now.

Q. The carrying capacity and intake of that canal was the same in 1889 as it was in 1909?

A. Well, the flumes are the same.

Q. Did you have anything to do with changes at the headgate or intake in 1909, Mr. Ellison?

A. I had charge, as engineer in charge, of all that work in the new intake.

Q. Now, tell us what was done.

A. There was 1025 feet of new ditch made to intersect the old ditch below the new headgate, tapping the river farther up in order to make a permanently good place for the intake to begin the work.

Q. Was the carrying capacity of the ditch enlarged by that work?

A. No, sir; that is, not below that. That work was done to draw water in a more uniform body. Before, when the river was very low, it required a great deal of work in the river to make a dam suffi-

(Testimony of Lewis F. Ellison.)

cient to bring water in in the low time in the river, when the water was low.

Cross-examination.

Q. (Mr. BURR.) Did I understand you to say, Mr. Ellison, that the work that was done in 1908 to 1909 did not enlarge the capacity of the ditch at all?

A. The new work at the upper end?

Q. Yes, any of it.

[180] A. No. That was made to be the same size as the old.

Q. Well, at the intake? A. Yes.

Q. Well, down below they enlarged it, didn't they?

A. No, I couldn't say they enlarged it.

Q. They increased the carrying capacity of that canal?

A. They increased by taking out the high places. As I stated to you once before, I think, there was some high points that we had to take out. I ran a level over from the head to the low end and found two points very high and found several points that was 4.5 high, and those points we moved. Most of the high points were from caves and sediment in the ditch, but there was two prominent high points that we removed that had never been removed before.

Q. Where were those points?

A. One was in Mr. Hawn's field and the other was close to the tunnel, just below the tunnel at the intake, about a mile—somewhere about a mile from the intake, close to the Gordon flume, the first flume and the cut nearest to the Northern Pacific Railroad's track.

(Testimony of Lewis F. Ellison.)

Q. Do you recall when the Milwaukee did its grading through there? A. Yes, sir.

Q. What year was that?

A. I could hardly tell you the year because I haven't thought anything about it. 1903 or 1904, somewhere along there; I couldn't tell you just when; no, it was later than that.

Mr. GRAVES.—1906 or 1907, I think.

[181] A. (Continued.) Well, I furnished the Milwaukee a good deal of lumber that year, but I haven't my books and just couldn't tell you the date, but it was 1906 and 1907, I think, along there, when they commenced construction first. I could look up the records and tell positively.

Q. Now, Mr. Ellison, the four thousand inches, was not that the diversion figure?

A. The four thousand inches in the canal?

Q. The four thousand inches in the canal, yes, sir.

A. I never made any accurate measurement myself of the amount of water.

Q. Was not that your understanding?

A. Yes, that was my understanding of it—four thousand inches.

Q. At diversion point?

A. Yes. That was my understanding at the beginning of the canal, when it was first built, that it was to carry that much water.

Redirect Examination.

Q. (Mr. GRAVES.) That was just your understanding from what you had heard somebody say?

(Testimony of Lewis F. Ellison.)

A. Yes.

Q. You never made any measurements?

A. I never made any measurements.

Q. So as to know how much water they were to divert or how much they were applying to use?

A. Yes, I never made any measurements.

[182] Q. Whatever the carrying capacity of the flumes was when they were constructed in 1889, it is the same now?

A. Yes, the same as they are now.

Q. So, if the Government measurement should show that they carried 102 to 104 second-feet, the canal was able to carry that amount in 1889?

A. The same as in 1889, yes.

Q. (Mr. BURR.) What was the pressure, Mr. Ellison, four or six inch pressure?

A. Well, I never took any notice to the measuring-box; I never paid any attention to that at all.

Q. What was understood to be the measurement?

Mr. GRAVES.—I object to anything that was understood or to his stating any opinion or impression, unless he had some knowledge.

Mr. BURR.—This witness was a civil engineer for the company at the time, and one of the oldest stockholders, I think he said, in the company.

The WITNESS.—No, sir.

Mr. GRAVES.—Oh, no; never was a stockholder and never used water out of the ditch.

Q. You have used water out of this ditch, haven't you, Mr. Ellison?

A. Not until the last two years. I never used any

(Testimony of Lewis F. Ellison.)

water out of the ditch except the reserved water I had from the Ellison-Splawn ditch. That was reserved, you remember.

Q. You have been getting water through this ditch since 1889, haven't you?

A. I got water through this ditch back to 1882. You remember [183] that was when my appropriation was made—in 1882.

Q. What was the custom of the country in regard to how many inches of pressure there was in a miner's inch, 4 or 6 inch pressure?

A. It was different. In the Toneum ditch there was a 4-inch pressure, in the Snyder there was a 2-inch pressure, in the Umptanum there was a 6-inch pressure above the opening or orifice and that was an inch orifice or opening and that made 6-inch pressure, miner's inches, or made 7 inches to the bottom of the box again—measured different ways—but that, at the beginning, I think, was a 4-inch pressure.

Q. In the West Side Irrigating Company's ditch?

Mr. GRAVES.—I object to all this testimony as immaterial. It does not go to show what measurement was used for the West Side.

Q. What measurement did they use in the West Side?

A. What I am speaking about is the Toneum ditch pressure, and I don't know that the West Side used that same pressure or not.

Q. How did they measure you your water in the Splawn-Ellison lateral?

A. We never measured it.

(Testimony of Lewis F. Ellison.)

Q. Had no box there for that ditch?

A. Had no box. Under our contract they furnished water to the amount of water that was necessary up to the amount of 500 inches.

Q. Up to the amount of 500 inches for the two?

A. Yes.

Q. Do you know the pressure that was used in the Manashtash [184] country that you testified to here? A. No.

Q. There are various units in the measurement of the inch used in that locality, are there not?

A. There is two ways, the 6-inch and the 4-inch, anyway, I think.

Q. Well, they use different orifices, too, do they not?

A. Well, I think they do. I am not positive about that, whether they use the same orifice or not.

(Witness excused.)

And thereupon a recess was taken till 2 o'clock P. M. the same day.

[185] SECOND HEARING.

FIRST DAY—AFTERNOON SESSION.

North Yakima, 2 P. M., March 22, 1915.

PRESENT—The same as at the morning session.

Continuation of proceedings pursuant to recess as follows, to wit:

Mr. GRAVES.—Defendant offers in evidence the minutes of the special meeting of the stockholders of the defendant corporation, held January 2, 1906, and by stipulation the following is read into the record:

“Motion by W. A. Stevens and second by Good-

win, that no action be taken to relinquish any water at the present time. Carried unanimously.”

Mr. GRAVES.—Defendant offers in evidence minutes of called stockholders’ meeting, held Thursday, December 21, 1905, and by stipulation I will read into the record the following:

“Ellensburg, Washington, Thursday,
December 21, 1905.

At a called meeting of the stockholders of The West Side Irrigating Company, a majority of the stockholders present and represented being a majority of the entire stock were present, with W. T. Sheldon in the chair, and trustees H. J. McCauley, W. A. Stevens and Mitchell Stevens also present, Mitchell Stevens was chosen by the Board of Trustees to act as secretary pro tem.

It was regularly moved and seconded that a called meeting be held on January 2, 1906, to discuss the feasibility of entering into contractual relations with the Government in the matter of a general agreement with the Government and with other water users of the Yakima river.

After a general discussion in which the [186] sense of the meeting was found to be against any concession of our water rights, motion was carried unanimously.”

Mr. BURR.—I would like to read into the record the following from the minutes of Trustees of the defendant corporation:

“Ellensburg, August 23, 1902.

Special meeting of the W. S. I. Co. called to order by President J. O. Gibson. By request of President,

J. P. Sharp acted as chairman pro tem and stated the object of the meeting, which was to consider ways and means of enlarging the ditch.

Motion by W. A. Stevens that the capital stock of The W. S. I. Co. be increased from \$30,000 to \$40,000. Motion carried.

Motion by Packwood that the trustees be empowered and instructed to employ a competent engineer to improve ditch and estimate cost of making ditch large enough to carry 3,500 inches of water. Motion carried.

Motion by Packwood that the president and secretary be instructed to call a special meeting for the purpose of changing by-laws empowering trustees to borrow money to the amount of \$11,000 instead of \$5,000 as at present. Motion carried."

And thereupon an adjournment was taken to 10 o'clock to-morrow morning.

[187] SECOND HEARING.

SECOND DAY, FORENOON SESSION.

North Yakima, 10 A. M., March 23, 1915.

PRESENT—The same as at former hearings.

Continuation of proceedings pursuant to adjournment as follows, to wit:

Testimony of F. J. Page, for Plaintiff (in Rebuttal).

F. J. PAGE, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GARRECHT.) What is your name?

A. F. J. Page.

Q. Where do you live, Mr. Page?

(Testimony of F. J. Page.)

A. Two miles south of Thorp.

Q. You live on this *Wide Side* irrigating canal?

A. Yes, sir.

Q. How long have you lived over there?

A. About 25 years.

Q. You have been there ever since this canal was established? A. Yes, sir.

Q. Does that canal run through your place?

A. It does.

Q. About how many feet or rods does it run through your place?

A. I think it is 114 rods, if I am not mistaken.

Q. At any time since this ditch was established was there any work done through your place?

A. Yes, sir.

Q. Do you recollect about what years?

A. No, I do not.

[188] Q. Have you any way of fixing the time approximately?

A. Why, it was when Sharp, Coleman & Bradshaw had the contract for enlarging the ditch, but I couldn't give the date at all.

Q. What did they do with reference to enlarging the ditch through your place?

A. Take it on the east line, there was an enlargement there of something like three rods long, that is, running northwest.

Q. Now, were there any enlargements made after that time?

A. Well, it was after that time that I was speaking of now.

(Testimony of F. J. Page.)

Q. You are speaking of the last time it was enlarged? A. Yes.

Q. I don't think I have that quite clear in my mind. Do you mean this was a time after the first enlargement made by Sharp? You said something about an enlargement being made by Sharp & Company there.

A. Why, they enlarged the ditch the whole length of it; I don't know as they enlarged it, but worked on it—enlarged it in places.

Q. Now, was it after that that they enlarged some 30 or 40 roads?

A. Yes, it was some little time after that.

Q. A year or so?

A. Why, it seems to me it was something like a couple of years, but I couldn't call the date.

Q. Could you approximate the time the railroad went through there? A. No, sir.

Q. You have not any way of fixing the date?

[189] A. No.

Q. But you do know it was after Sharp and Coleman went through there? A. Yes, sir.

Q. What work was done there at your place at that time?

A. The bank was weak there through my place, and they commenced at the upper side and then went back into the bank, something like 7 feet, and put it against the lower bank. They practically made no difference at the upper end of my place, but down there close to my buildings they made it a little wider, where it goes into the county road there.

(Testimony of F. J. Page.)

Q. Well, would the ditch or would it not carry more water after they got through working there than it would before?

A. Yes, it would carry more water. The upper side, there was no difference in that. The ditch makes a turn there where it goes through the county road, it was kind of jogged there and that held the water in there and they had it enlarged in that place to lead it off of the place.

Q. And this place on the lower end, about how many rods was that?

A. Just off-hand guessing it was probably about 30 rods.

Q. And how many feet was the ditch enlarged?

A. I really couldn't say what the total of it was because the bank keeps crumbling down all the time, but as near as I remember it was something like two feet there at the narrowest place. Of course I never took any measurement and don't know just what it was.

[190] Q. Do you know Mr. A. M. Lachman?

A. Yes, sir.

Q. Is his place between yours and the head of the ditch? A. It is.

Cross-examination.

Q. (Mr. GRAVES.) Counsel used the term "enlarged" in inquiring of you. As I understand it, at one point there in the ditch through your place they worked on it to repair it because it was breaking.

A. Yes, sir.

Q. And in that repair work at that particular

(Testimony of F. J. Page.)

point the ditch was made a little bit larger.

A. At the east line it was made a little bit larger.

Q. But the rest of the canal they did not enlarge the carrying capacity of?

A. I don't think they did only at that one point I speak of.

Q. And that had been breaking there and the water running out onto the land? A. It had.

Q. And this repairing at that point was to keep it from doing that?

A. Yes, sir. I believe I stated that.

Redirect Examination.

Q. (Mr. GARRECHT.) As I understood you there were two [191] places upon which work was done, or was it only one?

A. Only one what I call enlarged.

Q. That one that you call enlarged was an actual change in the width of the ditch, was it?

A. Why, that is the way I remember it, yes.

Q. And at the other place it was a mere repair?

A. It was making the lower bank stronger.

Q. They were not both then cases of repair?

A. Well, of course you would call it repair. They was making it stronger so it wouldn't keep a-breaking—the ditch. It broke fourteen times there in those thirty yards, but the bank was weak and they went into the upper side and took out the dirt there and then on the lower side they—

Q. You are talking about the upper place, are you not? A. Yes, sir.

Q. I want to get you away from that place for a

(Testimony of F. J. Page.)

moment and to speak of the 30-rod work. Now that 30-rod work, what was that, was that an enlargement of the ditch at that point?

A. That is what I called it, an enlargement; yes, sir.

Q. That was not a mere sliding of the bank at that point then?

A. No. No, the ditch was too narrow there and held the water, that was what made the break above, and they widened it so as to let the water off the upper end of my place.

Q. Did they or not give that 30 rods a greater capacity than it had ever had before at that point?

A. They straightened the ditch up and made it a little wider [192] at the bottom, and they cut a point there to let the water draw off better.

Q. How long were the men working on that part of the canal, do you know? A. I couldn't say, no.

Q. Now, in this testimony you have been giving lately you are referring to the second of the two jobs on that ditch, not the Bradshaw job, but a later job?

A. Not the Bradshaw job, but a later job, yes, sir; something, I should judge, like two years after that, but I couldn't say certain.

Q. When Bradshaw and those fellows were working on there did they increase the capacity of the ditch at that point?

A. I couldn't say, but on the upper part they plowed the bottom and plowed the sides and then worked the dirt over, so whether they were enlarg-

(Testimony of F. J. Page.)

ing it or not I couldn't say, but that was my impression, that they were enlarging it.

Q. How long did they have their men there?

A. No, I don't remember, I wasn't interested. They had a large crew come on my place for several days, but they worked both ways from my place.

Q. How many men and teams would you estimate they had? A. I don't know how many they had.

Q. How many were they working on the job the second time?

A. I really don't know anything about that either.

Q. Did they have quite a force there then?

A. Why, they had a few teams and a few men. In order to make that more plain, they would go in with a plow team [193] ahead and then come along with the men with the picks and then with scrapers and shovels and they were in there quite a few days with quite a number of men, but how many I couldn't say.

Q. Did they make the bottom of the ditch lower?

A. I think they made the bottom of the ditch lower, took a little off the high places and leveled it up—took a little off the high places and put it on the low places and leveled it up there.

Q. You say you were on that ditch 25 years?

A. Yes.

Q. Prior to this enlargement by Sharp—

Mr. GRAVES.—I would just suggest the witness did not use the word "enlargement" as his own term, and I object to counsel's using it, except as the witness wants to use it, as being leading.

(Testimony of F. J. Page.)

Q. Did or did not the Sharp and Bradshaw work give a greater capacity than the ditch had at any time prior to that job?

A. I really believe that is out of my power to answer that question because I ain't no engineer; I really wasn't interested and I don't know that they did, but I really believe they did, because they leveled it up and straightened it up so it carried more water, but to give an expert opinion on that I don't think I could answer it.

Q. No, as a practical man, I ask you, as a man familiar with running water in a ditch.

A. That was my opinion; yes, sir.

Q. Now, then, the work subsequent to that time: did they make the ditch larger, would you say as a practical man, [194] than it had been prior to that time? A. That is, the last work I spoke of?

Q. Yes, sir.

A. Yes, sir. It made it stronger right there and made it carry more water.

Recross-examination.

Q. (Mr. GRAVES.) Right at that point it made it stronger and a better ditch? A. Yes, sir.

Q. Did you see the carrying capacity of the flumes? A. No.

Q. You were not at the head end to see whether or not that was enlarged? A. No, sir.

Q. But right at this particular point it made a better ditch of it?

A. Yes. They carried it off better that way.

(Testimony of F. J. Page.)

Q. Instead of the water going around a point they straightened it out?

A. They straightened it up and made it draw better, yes.

(Witness excused.)

Testimony of A. M. Lechman, for Plaintiff (in Rebuttal).

[195] A. M. LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GARRECHT.) Where do you live?

A. One mile west of Thorp.

Q. Occasionally your name has been spelled a little different? A. I used to spell it different.

Q. How?

A. L-a-k-m-a-n sometimes and L-a-c-h-m-a-n.

Q. You are a brother of Maggie Lechman, who testified here yesterday? A. Yes, sir.

Q. Did you state where you were living?

A. About a mile west or northwest from Thorp.

Q. Do you live on this West Side or West Kittitas canal? A. Yes, sir.

Q. And where is your place with reference to the head of the ditch from Mr. Page's place?

A. It is possibly half way to the head from Mr. Page's, I would judge.

Q. You would be towards the head of the ditch from Mr. Page's place? A. Yes, sir.

Q. Now, Mr. Lechman, I hand you Plaintiff's Exhibit "K," which is a photostatic copy of stream

(Testimony of A. M. Lechman.)

observations of gage heights made on the West Side or West Kittitas canal, for the months of July to September, 1905, and ask you to examine those sheets that are attached to the certificate and say in whose handwriting those figures and letters are, other than the ones that are marked by [196] Maggie Lechman. A. They are mine.

Q. Now, will you just state how those were taken?

A. Well, when they first put that gage in—I forget the name of the man that put it in or had charge of putting it in—he asked me about reading the gage, if I would have the time to read the gage; I told him I would, and he instructed me as to how to read it, and gave me the books or cards to send in reports, and I started in as instructed and read the gage at the times given.

Q. Now, did you make memorandums at the time of the readings—put them in the book when you read them? A. Yes, sir.

Q. Well, how are they as to accuracy—how close?

A. Well, as to accuracy, I tried to do the best I could, and the record, I would say, is as close as any ordinary person would get it. I always read them conscientiously and tried to be fair in the readings.

Q. Now, where was this gage placed in the stream, the place where the readings were taken?

A. There is a bridge just above our house and it was placed on the lower bank, on a timber of the bridge that goes down into the ditch.

Q. It was fastened there, was it? A. Yes, sir.

Q. Were you living there during 1905?

(Testimony of A. M. Lechman.)

A. Yes, sir.

Q. Any time after 1905 were there any changes made in the ditch going through your place, Mr. Lechman?

A. There was considerable work done there after that time [197] as to the exact dates I don't remember, but it was after 1905.

Q. Will you just state what was done to the ditch as it went through your place there?

A. Well, as close as I can remember—that is, I don't know how much was taken out, but judging from the kind of work that was done and my observation, I should judge it was widened; it was taken off the upper bank or, that is, the upper slope, and widened along through there and also deepened to a considerable extent—certain extent—and I would judge it was widened from where it strikes out line, just below the gage, on down half way through the ranch, at least as wide, and I would judge on an average of about 2 feet—some places possibly less, some places a little more.

Q. Have you any way of fixing the fact that it was enlarged, any physical fact, out there through your place? A. Yes, sir.

Q. State what it was.

A. There is a pipe-line that runs through and under that ditch; I helped put the pipe-line in and dug the ditch to put it in and know at what depth the pipe-line was put and what depth it is at the present time; I have had to take it up, or I dug it up to find out if there was enough of covering over it to pre-

(Testimony of A. M. Lechman.)

vent it freezing during the winter, as we have had some trouble with that, and that pipe-line we aimed to get 18 inches in all places, and under the ditch it was placed thereabouts, I wouldn't say it was exactly 18 inches, but it was placed thereabouts.

[198] Q. And how is that pipe in there now since this work was done?

A. Well, about 4 feet from the bottom of the upper slope the pipe is 9 inches deep at the present time, and as the pipe approaches the upper slope it runs down so in one place it is just four inches deep—nearly on the surface.

Q. Now about how many people and teams were at work there through your place during the time these changes or work was done?

A. Well, I don't recollect just how many. There was quite a crew. Of course what we consider quite a crew there some would consider—

Q. Was there more than one team?

A. Yes, sir, there was.

Q. Could you approximate how many teams?

A. Well, to my recollection there was in the neighborhood of six or eight teams, if I remember right. There was quite a crew for that work right around there at that time.

Q. And could you give an idea of about the number of men at work with the teams?

A. No, I could not; but if there were, say, eight teams there would possibly be eleven men—eleven or twelve men would constitute a crew for that many teams.

(Testimony of A. M. Lechman.)

Q. How many days were they working through your place?

A. That I don't remember. They were there for several days, but how long I haven't the least recollection, because I had other work to do and just see them around when I was in around the place.

[199] Q. In order to fix this date as near as you can I will ask you whether or not it was before or after you took these readings. A. It was after.

Cross-examination.

Q. (Mr. GRAVES.) You are a stockholder in the West Side Irrigating Company, are you?

A. No, sir.

Q. Your father is not either? A. No, sir.

Q. Was it your father who testified yesterday?

A. Yes, sir.

Q. You and your father are not on good terms with the officers of the West Side Irrigating Company, isn't that so?

A. I never have had any quarrel with them.

Q. You have not, but he has?

A. Well, they had little differences, but it wasn't—the only difference he ever had was with one of the directors—that is, he was a director at one time, and it seems they were always at outs and naturally when they were thrown together they didn't get along very well. They had their dealings several years before that caused hard feelings.

Q. In the working of a canal of that kind, where it is a dirt canal, dirt washes in every winter season, does it [200] not?

(Testimony of A. M. Lechman.)

A. It does to a certain extent.

Q. Moss will grow and accumulate and has to be cleaned out—that is true, isn't it? A. It is.

Redirect Examination.

Q. (Mr. BURR.) Mr. Lechman, in that work that was done that you have testified was similar work, done in the length of canal between you and the place where the old and new sections of ditch joined, was that work all similar? What I mean is this: there was a point up there, was there not, where an entirely new ditch was constructed?

A. Yes, sir.

Q. Now, this improvement work that you have told us of as having been done through your place, was similar work done down to the lower end of the new section, or was it not?

A. Well, I don't know from personal observation that it was. I know that there was work done up there and in the field adjoining ours, as far as I could see. I have seen them working there, watched them work, and work was done above, but I can't say I was right to the work or know what was done exactly right above that place.

Q. They were working with teams on that section up above [201] you for sometime, were they?

A. Yes, sir.

Q. For how long would you say?

A. Well, that I haven't the faintest recollection.

Q. How far is that section from the upper end of your place up to the junction with the old ditch that was abandoned, would you say?

(Testimony of A. M. Lechman.)

A. I would say about a mile and a quarter, possibly not quite that far.

Q. Now then, below your place were they doing similar work that year?

A. Well, out of sight of the place—that is, where we couldn't see from our house. I don't remember just seeing them working, except along at Mr. Page's, I supposed they worked all along, but I can't say I saw them working all along, but I see them working—

Mr. GRAVES.—Just what you know, Mr. Lechman.

A. (Continued.) Well, just what I know? I know they worked all through our place; how much work was done below I don't know as well as the work that was done near the house.

(Witness excused.)

Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).

[202] PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Taylor, you have had opportunity to examine the figures presented by Plaintiff's Exhibits "J" and "K," and I will ask you whether from the figures thus presented it is possible to adduce the amount of water flowing at the point of measurement, to wit: at the gage, for each of the days on which observation was taken. A. It is.

Q. Have you the computations for the year 1905?

A. I have.

Q. In accordance with the figures presented by

(Testimony of Paul Taylor.)

those exhibits? A. Yes.

Q. I hand you this sheet, Mr. Taylor. Will you testify as to whether or not those computations are presented correctly upon that sheet?

A. They are. They are my own figures.

Mr. BURR.—I offer that sheet in evidence.

Sheet referred to offered in evidence, marked Plaintiff's Exhibit "P" and returned and filed herewith.

Q. Now, Mr. Taylor, the figures contained on Water Supply Paper No. 135, being Plaintiff's Exhibit "E," showing the discharges of the West Kit-titas Canal, found on page 109 of said Water Supply Paper: Will you state whether or not you have checked the computation shown for the discharges upon that page? A. I have.

Q. Will you state how far they are correct?

[203] A. I found quite a few places where I could not agree altogether with this Water Supply Paper, the data being given to the nearest second-foot.

Q. How great is the variation, Mr. Taylor?

A. The maximum variation that I found was a little over three per cent. That occurred in only one case. The others are within two per cent or less.

Q. Do the figures shown upon that page of the Water Supply Paper referred to, or do they not, agree with the figures as to cross-section and current meter measure given by George F. Harley in Plaintiff's Exhibit "O"? A. They agree.

Q. What kind of a mathematical computation is it,

(Testimony of Paul Taylor.)

Mr. Taylor, to check these figures; that is, is it a fairly simply or a complex one?

A. That is purely a mathematical application of gage heights to discharge, after you have developed your discharge curve from the measurements made.

Cross-examination.

Q. (Mr. GRAVES.) What do the words on page 111 of this Water Supply Paper No. 135, Plaintiff's Exhibit "E," mean, under the heading "West Kit-titas, irrigated area 7,000 acres"? What does that mean in this Water Supply Paper?

A. That means for that year 7,000 acres was the approximate area irrigated.

[204] Q. Where you use the word "discharge" in these columns—under the word "discharge"—does that mean the number of second-feet passing that particular gaging station?

A. At that particular gaging station.

Q. This particular gaging station referred to in this Water Supply Paper, No. 135, Plaintiff's Exhibit "E," was that the one at the Lechman place?

A. The gage heights are those at the gaging station, and I see a note here that this was measured in a 14-foot flume, and I assume that was made in Gordon's flume. I might explain that it is a common practice for hydrographers to measure the discharge at any place along the ditch where there are better conditions than there might be at the gage. The conditions for the gage or the gagings are now always identical.

Q. For instance, you would not expect any high

(Testimony of Paul Taylor.)

degree of accuracy to be found at your gaging station where the water by reason of the shape of the banks or the bed of the stream is such that the water swirls and eddies instead of running in a smooth and regular flow—such a point as that, where the water would operate in that way, that is, where there were swirls and eddies, would not be a satisfactory point to take a measurement, would it?

A. That would not be a satisfactory point for a measurement, but it might be a good place for a gage.

Q. Now referring to Plaintiff's Exhibit "O": Do you know where the measurements were taken from which you got those figures?

A. Now, I want to make it clear to you that in both cases [205] the gage is located on the up-stream side of the bridge, and looking down-stream, on the left-hand side. Now, then, in 1905 those measurements were made right from that bridge, but in 1904 they were made in that 14-foot flume, which was probably Gordon's flume—I think that is what they call it up there.

Redirect Examination.

Q. (Mr. BURR.) Are you familiar, Mr. Taylor, with the condition of the water at that bridge on Lechman's place?

A. I have been perfectly familiar with that location since 1912; that is, I have come in personal contact with it since 1912.

Q. And what do you say the condition of the water was?

A. The conditions there are all right for gaging.

(Testimony of Paul Taylor.)

The only thing is that in gaging from Gordon's flume—it's simply easier, that's all there is to it. That is the reason why we go up there sometimes. There have been one or two diversions, I don't remember off-hand, small diversions, between the two places, but when we make measurements there ourselves we do it either when those people are not diverting any water themselves or if we find they are we make gagings at both places.

Q. (Mr. GRAVES.) You mean you have been doing that since you have had charge of it?

A. Yes, sir.

[206] Q. Whatever readings the Lechmans or those others made, you do not know anything about that?

A. I do not know anything about that only what is shown in the water supply tables.

(Witness excused.)

Mr. BURR.—That is our case, except possibly we may have a little surrebuttal.

PLAINTIFF RESTS.

**Testimony of Mitchell Stevens, for Defendant
(Recalled in Surrebuttal).**

[207] MITCHELL STEVENS, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) I think you stated that you had been acquainted with the West Side Irrigating Company's canal since 1889.

A. Yes, sir, more or less.

Q. Mr. Stevens, did you know the size of the flumes

(Testimony of Mitchell Stevens.)

on the West Side Irrigating Company's ditch at the time those flumes were constructed or afterwards?

A. Yes, sir.

Q. What have you to say as to the size of the flumes as built there by Mr. Ellison, in 1889, as compared with the size of the flumes now?

A. They are the same width.

Q. Are there any of those flumes that are still in existence as originally put in?

A. Yes, sir. The Gordon flume, the sides of the flume are still there—there has been a new flume put in it, but the sides are still there, and the flume in the Ellison field is still there.

Q. The flume called the Ellison flume is the same flume? A. That is the same flume.

Q. Just briefly, when was there any work of any moment or any importance done upon this canal after its construction in 1889—about when?

A. Well, there was repair work done different years, but in 1903 and 1904 Sharp, Bradshaw & Coleman did the largest amount of work.

Q. I don't remember whether you testified to it or not, but what was the financial situation or financial condition [208] in Kittitas County during the '90's?

A. They were very bad; a good many people went broke; it was hard to raise money to—

Mr. BURR.—One moment. We have not introduced any testimony to contradict what was gone into in regard to that in your case in chief.

Q. Now, Mr. Stevens, what was the fact as to the

(Testimony of Mitchell Stevens.)

condition the ditch had gotten into during that period?

A. It had gotten into very bad condition along the side hills. The side hills along that ditch in the Gordon place and along by the Mrs. Bond place and along through the Page place were bad about slipping—slipping into the ditch.

Q. Now, in substance, what work did Sharp, Bradshaw & Coleman do? What was the character of the work which they did?

A. Well, they cleaned out those slides and in places—there at Page's they broke the lower bank of the ditch—there was a narrow place there at Page's, just above the road, and they widened it there.

Q. That was in 1903 and 1904?

A. That was in 1904; they worked the lower end of the ditch in 1903, and I can't just remember whether they started in in the spring of 1904—about the middle of the ditch they started in in 1904, in the spring, and worked the upper end of the ditch.

Q. Now, there have been some readings of the canal in 1904 and 1905 given here. I want to ask you what was the condition of the ditch during those years.

A. Well, their work was fresh and the side hill there at [209] Page's always was porous, it used to be a very difficult place to hold water, and particularly just above the road, and they worked there in widening it somewhat, and the work was fresh and it broke very badly there the summer of 1904. I wasn't a trustee, but I was interested in the ditch

(Testimony of Mitchell Stevens.)

and I went up there two or three times and looked those banks over and made a study of the banks in the summer of 1904. The ditch broke there one time and washed out a great hole, it took three or four days to fix it, and they turned the water in and it broke out again the next day; then they fixed the ditch again with—well, I went up there after it broke and suggested that they put in some boards in the ditch where it was broke on the lower side and make a board wall and put the dirt in on each side. The dirt was so porous and full of gravel it was hard to make fresh work stand. They put in these boards and my recollection is the hole was cut for so deep that in a portion of that hole the boards were 16-foot long. That time it stayed. They were very careful in putting the water in there, raised it an inch a day.

Q. What was the fact in the years 1904 and 1905, after this work had been done, as to the banks being weakened because of recent construction and the like?

A. Well, in 1904 and 1905 the banks were weak through the Page place and through the Ellison place and broke frequently—broke a number of times. The summer of 1905 it broke in the Ellison place and broke in the Page place and broke in the Jim Stevens place, just below there—it's a continuation of that same bank.

[210] Q. Mr. Stevens, has there been any change in the carrying capacity of that canal since 1905, since the work done by Sharp, Bradshaw & Coleman in 1903 and 1904?

(Testimony of Mitchell Stevens.)

A. Only this, that the flow is steady. Last year the banks never broke at all, the full length of the ditch and—

Q. Well, the point is, was the capacity of the canal itself increased?

A. The capacity is the same, but the ditch in 1904 and 1905 couldn't be handled in the same way that we handle it now on account of those banks. The size of the ditch, as I understand it, is the same.

Q. Now, Mr. Stevens, did you see this meter which the Lechmans were reading?

A. I didn't see the meter. I saw the gage and saw the bridge.

Q. Just state what sort of gage it was.

A. The gage was a piece of wood with figures on it, nailed to the corner of the bridge; the bridge is a common road bridge, sixteen feet wide, and the abutments consisted of posts, about five in number, on each side, and then there is a plank wall back of that to hold the dirt from going into the ditch; the bottom there is a dirt bottom; the contour of the ditch above is irregular, somewhat irregular; the banks of the ditch above are rocky and rough and also below the bridge, and one time when we went along that meter, the sediment had settled in on the bottom of this rod some four or five inches.

Q. They were not using a current meter there at that point [211] —you saw them, but you did not see anything but this meter or, rather, this gage?

A. Well, I didn't see them use a current meter. I suppose they did in the first place. I suppose they

(Testimony of Mitchell Stevens.)

used a current meter when they took the original reading.

Q. What would you say as to how a current meter should be used there at that point?

Mr. BURR.—This witness has not been qualified as an engineer and he is incompetent to testify as to current meters, unless his competency is first set forth and shown.

Q. You may state what the condition of the water was there, Mr. Stevens, and where this gage was.

A. The water at such a point is full of riffles and swirls and eddies. The current is not uniform, it can't be.

Q. How many acres of land, substantially, were under cultivation and being cultivated and irrigated from this canal in 1905?

A. Over seven thousand. We figured that up one time, I can't remember the exact acreage, but its over seven thousand.

Q. Is that same acreage being watered now?

A. Yes, sir.

Q. Has there been any increase in the acreage?

A. I don't know of any. I am quite familiar with that country, but I don't know of any new acreage.

Q. Do you know about Splawn and Ellison's old canal that they had there before you built your canal? Did you know of their having a canal there?

[212] A. Yes, sir. I was there before the ditch was made and saw the old—I was there before the West Side ditch was built and saw their ditch.

Q. When the West Side ditch was built what be-

(Testimony of Mitchell Stevens.)

came of that old canal?

A. The West Side took up that canal.

Q. The other ditch ran right to the river, didn't it?

A. Yes, sir.

Q. And the water which they got you carry or is allowed to be carried through your canal?

A. Yes, sir. And we allow them to take their water, we don't turn it on or off or bother with it. Their ditch comes out a little ways below the head of our ditch.

Mr. BURR.—We object to oral testimony concerning that matter. The contract itself should be introduced.

Mr. GRAVES.—The contract is in evidence. You introduced it yesterday.

Mr. BURR.—We introduced but one; there are two contracts, one with Splawn and one with Ellison.

Q. Do they turn the water out before it reaches the Gordon flume, the first flume?

A. Yes, sir.

Q. So the dimensions of the Gordon flume at that point in the ditch represents the carrying capacity for the stockholders of the West Side Irrigating Company? A. Yes, sir.

Q. As shown by Defendant's Exhibit "2" in this record, the contract between Clinesmith and Clerf and The West Side Irrigating Company.

A. Yes, sir.

[213] Mr. GRAVES.—I am not sure that I proved by Mr. I. E. Anderson, the civil engineer, what season of the year he took the readings there in 1912 and 1913.

(Testimony of Mitchell Stevens.)

Q. Do you know, Mr. Stevens, when Mr. Anderson was taking his readings there? A. Yes, sir.

Q. What time was it, what month in the year?

A. September.

Q. What is the fact as to the amount of irrigating in the Kittitas valley in September as compared with the summer months of June, July and August?

A. During that time we were not irrigating much.

Q. So that his readings taken at that time do not represent or indicate the full capacity of the canal?

Mr. GARRECHT.—We object to that as argumentative.

A. Oh, no. The ditch was not near full.

Q. It was testified here that in 1909 there was some work done. Was that the work at the head of the canal or intake?

A. In 1909 we made a new intake.

Q. That is the one Mr. Ellison testified to yesterday? A. Yes, sir.

Q. Now, there was some testimony that along about that time there was some work done along the canal. What work was done along the canal?

A. Well, there at Mr. Lechman's the ditch runs through his corral and his stock wore off the banks, and where the bank of the ditch touches the hill, where it starts to climb the hill, the banks are weak and we took dirt off of the upper side of the ditch and ploughed it in [214] against the lower bank to make it stronger—made the banks heavier. We didn't widen the ditch there, we cleaned out the ditch.

(Testimony of Mitchell Stevens.)

Q. The dirt had been carried down by stock climbing up over the hillside by the canal, I understand?

A. Yes, sir.

Q. You heard Mr. Page tell about work done in his field. What was the character of that work? Was there any done there in 1909? You referred before, I think, to the work done there in 1904 and 1905.

A. In 1909 we cleaned it out good. That is on a sidehill, a steep sidehill,—and his stock runs up and down the hill—it's right below his barn—and the rocks and sediment works down into the ditch. We cleaned that all out, and in addition to that we went back into the bank and we used the dirt to reinforce the lower bank where it was weak, where it had been breaking; and in addition to that we put in a board wall 800 or 1000 feet long, and the object of the board wall was to stop the filtering of the water through there, and the object of the dirt was to hold the dirt against the wall so that the sediment would settle against the wall; and we cut down the side of the hill and we used that excavation in placing against this wall. We didn't make it any wider than it was above there.

Q. What year was that? Do you recall whether that was in 1904 and 1905, or was that in 1909 that you put in that board wall?

A. I am not sure about the year. It was somewhere from 1905 to 1909, but it's pretty hard for me to recall the [215] year.

Q. What is the fact as to the character of con-

(Testimony of Mitchell Stevens.)

struction of that canal? Is it excavated in dirt except where there are flumes?

A. Yes, sir, dirt and gravel.

Q. There is no concreting of that canal?

A. No, sir.

Q. What is the fact as to a dirt canal such as that, located as that is along hillsides, as to its filling up and the like?

A. Every year the frost loosens up the upper bank and the dirt and gravel works down into the canal and has to be removed.

Q. How do you remove that; how is that taken out of there?

A. We plough along the upper corner in the bank and—

Q. Well, you take it out with ploughs and scrapers, did you?

A. Ploughs and scrapers, yes, sir.

Q. So when Lechman saw you working along there you were taking dirt out of the ditch?

A. That had settled in there—filtered in there—worked in there.

Mr. GRAVES.—I think that is all.

The WITNESS.—I would like to state that in 1905 the upper end of the ditch at the river gave us a lot of trouble. The river had washed out just opposite the ends of the ditch and—

Mr. BURR.—I think that is pretty well in the record. You gave testimony on that before you closed your case.

Mr. GRAVES.—I don't think we have given it as

(Testimony of Mitchell Stevens.)

to the year. There was testimony on the point that the ditch changed [216] frequently, but I would like to have this go in as to 1905. Just go on, Mr. Stevens.

The WITNESS.—We were unable to run the ditch full the latter part of the season on that account, we couldn't get it in up there at the upper end. We started in there in the fall and put in a stone and brush dam, under the supervision of Mr. Burroughs, I think it is, in the fall of 1905.

There is another point I would like to state to you: In the early history of the ditch the slides from the hill were far worse than they are now. In 1906 we cut down those slopes to some extent, notably in Mrs. Ellison's field. We went up the hill quite a ways, and we used that dirt, we used that excavation, in plating the lower bank in Mrs. Ellison's field so it would stand. That added safety to the ditch.

Q. (Mr. GRAVES.) There was no cause for your increasing the carrying capacity of the canal over its original construction, was there?

Mr. GARRECHT.—Objected to as leading and incompetent, irrelevant and immaterial.

A. No, sir. Generally the ditch was big enough and we didn't widen the ditch except at certain narrow points where it filled in from the hill.

Mr. GRAVES.—That is all.

The WITNESS.—I would like to state the further fact, I do not think I have referred to it, that there is a cut just below my field, at Prather's, and the dirt slips in there during the irrigating season;

(Testimony of Mitchell Stevens.)

it's next to impossible to get it all out o there with the kind of [217] tools that we have, and in 1905, owing to the fresh work done by Coleman and Bradshaw, there was lots of sediment in the ditch, there was a slide in the Prather cut and the ditch was nearly half full of mud that fall, caused by the slides below in the Prather cut. In 1906 we put a board wall in the Prather cut, consisting of cedar posts and plank two inches thick and braced from the opposite bank and four feet high to keep those slides out, and since that time the sediment never has settled in our field.

I would like to state another fact in regard to the slides there at the mill pond—

Mr. GRAVES.—I asked you generally about those. I only wanted with reference to the years 1904 and 1905, I do not care as to other years. If this has not reference to anything occurring in 1904 and 1905 I do not care for it.

The WITNESS.—No, not those years.

Cross-examination.

Q. (Mr. GARRECHT.) You say that the ditch was big enough to carry all the water you wanted from the very beginning?

A. In all but just a very few places. There was a few narrow places. Now, whether those were originally excavated or not I couldn't say. All those narrow places [218] are in cuts.

Q. And you were carrying about the same amount of water during all those years except during the time when you had these break-outs?

(Testimony of Mitchell Stevens.)

A. Yes, sir, I think so.

Q. When did you see this water gage there on the bridge—1903?

A. No, I didn't see it till 1905.

Q. Well, you saw it there in 1905. During the summer? A. Yes, sir.

Q. You knew what it was? A. Oh, yes.

Q. Did you know why it was there? A. Yes.

Q. You knew that the Government was making an estimate of what water was going into these various ditches?

A. Well, that was my understanding. I understood so.

(Witness excused.)

Testimony of J. M. Burch, for Defendant (in Surrebuttal).

[219] J. M. BURCH, produced as a witness for defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GRAVES.) Where do you reside, Mr. Burch? A. In Ellensburg at present.

Q. You were county commissioner up there and are now in the city council? A. Sorry to say yes.

Q. Are you a stockholder in The West Side Irrigating company now?

A. Not at the present time, no, sir.

Q. Were you ever connected with The West Side Irrigating company? A. Yes, sir.

Q. What time did you first become connected with the company?

(Testimony of J. M. Burch.)

A. Well, I was one of the first organizers of the company, and from that time up until 1904, the fall of 1904—December, 1904.

Q. You were acquainted with the canal though from the time of its first construction down to the present time? A. Yes, sir.

Q. When did you remove from there to Ellensburg, or remove from the West Side? Do you remember when it was? A. Two years ago this month.

Q. 1913? A. Yes, sir.

Q. Mr. Burch, what was there there at the head of the canal when the construction of the West Side ditch was begun? Was there any ditch when you first started the West Side canal?

[220] A. Yes, sir. Mr. Ellison and Mr. Splawn had a ditch there.

Q. What effect did the construction of the West Side have upon the old ditch?

A. We had to take up that ditch in order to get a right of way for ours.

Q. Since that time have they been taking water out of your ditch?

A. Yes, sir, they have, unless it is the last two years. I don't know whether Mr. Ellison took it out or not; I know Mr. Bruton did.

Q. Was the water which they carried through your canal any part of your appropriation?

A. No, sir.

Mr. GARRECHT.—We object to that. That is of record, if anywhere. Mr. Burch's recollection on the subject is absolutely valueless as compared with the

(Testimony of J. M. Burch.)

record, and the record should be introduced.

Mr. GRAVES.—The record has been introduced.

Mr. GARRECHT.—No, it has not been, Judge. The other contract is not here and this is for only 500 inches.

Mr. GRAVES.—I would just as soon have it in. I have a copy here, but it is not certified. This is from my personal files, that I had prepared for my use, but it is not certified.

Mr. GARRECHT.—We do not have any objection to it because it is not certified, but I make the objection, and I think it is a valid one, that it does not prove any appropriation by these people.

Mr. GRAVES.—I do not care to introduce it, as far as that is concerned. I will put in the oral testimony.

[221] Mr. GARRECHT.—We object to that on the ground that it is not the best evidence.

Mr. GRAVES.—I tender this paper as a copy of the agreement.

Mr. GARRECHT.—We have no objection to the copy tendered on account of its not having been certified, but our position is that that does not prove any appropriation of water at all by these parties as against anybody else.

Paper writing referred to offered in evidence, marked as Defendant's Exhibit "4," and returned and filed herewith.

Q. (Mr. GRAVES.) Mr. Burch, are you acquainted with the flumes upon this canal?

A. Yes, sir.

Q. Did you know them when they were put in, in

(Testimony of J. M. Burch.)

1889, by Mr. Ellison? A. I did.

Q. How does their carrying capacity as they now stand compare with their carrying capacity in 1889, the carrying capacity of those flumes?

A. They are all the same unless it would be one flume down on Mitchell Steven's place; that is narrower, but they went across the canyon and they gained more fall and they cut off about 30 rods of ditch, so I would think it would be about the same. The others are the same.

Q. Are there any of those flumes as now maintained there that are the same as they were originally constructed? A. There are two there.

Q. State the location of those.

A. There is the flume in the Gordon field and the flume in Mrs. Ellison's field.

Q. That one in Mrs. Ellison's field, is that the one that [222] was originally constructed?

A. Yes, sir.

Q. And how about the Gordon flume?

A. That is the same.

Q. You heard Mr. Mitchell Steven's testimony here regarding trouble in 1904 and 1905 with the canal. What is your recollection, just briefly, on those points?

A. I would have to give my recollection in 1903 and 1904. In 1904, in December, I was not a director, and in 1905 I had no active part in the workings of the ditch.

Q. Now, then, what were the conditions there in 1903 and 1904—what was being done?

(Testimony of J. M. Burch.)

A. In 1903 we let Sharp and Coleman have a contract to put the ditch down through its original construction, or as originally planned.

Q. What had been the fact during the late '90's and early 1900's about the ditch having gotten out of repair and filled up and the like?

A. Well, the ditch never was finished.

Q. Well, how do you mean never finished?

A. I mean that the contractors went broke when they got about half way through, and the lower end was never finished.

Q. The lower end? A. No, sir.

Q. Was that completed in 1903?

A. Well, in 1903 and 1904 it was. It was finished up on the original estimate on the contract with Clinesmith and Clerf.

Q. Do you remember about the time of the making of the contract [223] with the Government of the United States, that that was done by the trustees about 1905? A. I didn't know it at the time.

Q. You heard about it at the time it was done, didn't you?

A. I didn't know it was done until six months afterwards.

Q. At that time, in 1905, was there the same area under cultivation and irrigation from the ditch that there is now?

A. Why, I think practically the same. I don't know of any new land.

Q. How many acres have you estimated were under the canal and irrigated from the canal?

(Testimony of J. M. Burch.)

A. Well, I never made an estimate of that. They used to claim there was between 7,000 and 8,000 acres. Mr. Sharp and Stevens made an estimate of that, but I never did.

Q. You never went into that?

A. No, I never went into that part of it.

Q. Were you present at the meeting of the stockholders, in Ellensburg, in 1906, when the question of validating this contract with the United States came up, or do you recall that?

A. After it had been signed?

Q. Yes.

A. No, sir, I was not there.

Q. You were not present at that time?

A. No, sir. Not after the contract had been signed, no.

Q. I call your attention to December 2d; there was a called meeting of the stockholders to be held January 2, 1906—the contract was signed by the board of trustees in [224] the fall of 1905. Do you recall being present at a stockholders' meeting in January, 1906, when a motion was carried not to carry out this contract with the Government?

A. I was there when there was a motion made not to concede anything to the Government, but I didn't know there had been a contract signed at that time.

Q. You did not know at that time there had been a contract signed? A. No, sir.

Q. But you recall being present at the stockholders' meeting when that action was taken?

A. Yes, sir.

(Testimony of J. M. Burch.)

Q. Did the stockholders at any time to your knowledge, any of them, ever ratify that agreement after they discovered that it was made?

Mr. BURR.—You mean as individuals?

Mr. GRAVES.—Yes, as far as he knows.

A. Do you mean at a stockholders' meeting?

Q. I mean did the stockholders ever ratify it in any way?

A. Well, not to my knowledge. They might have done it when I wasn't there.

Q. What did the company do from 1905 down to the present time as to paying any attention to this contract? Did it limit itself to the 80 feet or go on and use the amount of water they had been accustomed to use?

A. I don't think they ever paid any attention to it. They did not up to the time I sold my place.

Q. Well, that was after this suit was commenced that you sold your place?

[225] A. Yes; two years ago.

Cross-examination.

Q. (Mr. BURR.) Mr. Burch, you say there were a couple of flumes put in there in 1889 that are still in existence. Did I understand you to so state?

A. Practically the same, yes.

Q. Haven't they been reconstructed since that time?

A. Oh, they may have had new bottoms, yes.

Q. What kind of wood are they made of?

A. Fir.

Q. I would like to know what kind of wood it is

(Testimony of J. M. Burch.)

that will last 26 years. Are you confident those two flumes have lasted 26 years without complete reconstruction?

A. Well, they may have put new bottoms in one time and things like that.

Q. New bottoms in one time and new sides another? A. Yes, they could have done that.

Q. Now, Mr. Burch, are you familiar with the country south of Ellensburg there, near town, at all?

A. Some.

Q. Do you know where Mr. Becher lives?

A. Jake Becher?

Q. I think so, yes. It's south of town—the Becher place. A. Yes. I think it's Emil Becher.

Q. Now, has he not increased the amount of land he is irrigating in the last 10 years—in fact, in the last 4 [226] years has he not increased it?

A. Well, there are three or four Bechers. If you will tell me the one you mean—I would like his first name.

Q. Has any one of the Bechers increased his irrigation down there just south of town? I don't know Mr. Becher's first name.

A. South of town would be on the other side of the river, towards Yakima. Southwest of town you would get in on—

Q. No, I mean below town, on the west side of the river. Isn't there a Becher ranch there?

A. Yes, there is a Becher ranch there, but that is an old, improved ranch when he bought out there—the old Damman place.

(Testimony of J. M. Burch.)

Q. Hasn't he bought 20 acres of unimproved land that he has since put under irrigation?

A. Well, I don't know. He might down next to the river.

Q. You don't know whether he has bought 20 shares of new stock or not? A. No, I don't know.

Redirect Examination.

Q. (Mr. GRAVES.) You say you never paid any attention to this contract with the Government after it was made by your company?

A. No. I never saw the contract.

(Witness excused.)

Testimony of Jeff H. Lee, for Defendant (Recalled in Surrebuttal).

[227] JEFF H. LEE, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) There was reference made here a moment ago to the Emil Becher place. Do you know what land that is?

A. I know that Mr. Emil Becher and Charlie White own 80 acres, or about 80 acres, of the Damman place.

Q. That was the old John Damman place, 80 acres of his place? Is that the Damman place you mean?

A. As I understand it.

Q. How long has that place been under cultivation and irrigation, that 80 acres? A. I couldn't say.

Q. As far as you can remember—how far back?

A. Since 1900 to my knowledge.

(Testimony of Jeff H. Lee.)

Cross-examination.

Q. (Mr. BURR.) Mr. Lee, besides that 80 acres does not Becher own 20 acres more that he has bought within the last three or four years?

A. Not that I know of.

(Witness excused.)

**Testimony of W. A. Stevens, for Defendant
(Recalled in Surrebuttal).**

[228] W. A. STEVENS, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Stevens, when was the Damman place referred to a minute ago in the testimony, when was that first improved?

A. 1872 or '73.

Q. Long before the construction of the West Side Irrigating Company's canal? A. Yes.

Q. Then afterwards the West Side Irrigating Company's ditch covered this land?

A. Yes, sir.

(Witness excused.)

**Testimony of Jeff H. Lee, for Defendant (Recalled
in Surrebuttal).**

[229] JEFF H. LEE, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Lee, when did you first become connected with The West Side Irrigating Company in any way?

A. In 1904 I bought land under that canal and in the spring of 1905 I was elected a trustee.

Q. Did you do any work for The West Side Irri-

(Testimony of Jeff H. Lee.)

gating Company in 1905?

A. Yes, sir; the spring of 1905.

Q. Just state what it was you did.

A. I started at what we termed the tail of the ditch—

Q. That is the lower end of the ditch, you mean, by the tail of the ditch?

A. Yes, sir. And cleaned the ditch of the big rocks and a small per cent of the slides and rocks the stock had rolled in, halfway. We was in debt and had no money.

Q. Now, then, did you widen the ditch in any way?

A. No, sir.

Q. You learned then the actual size of the ditch from your first acquaintance with the ditch in working on it there in 1905?

A. Yes, sir. We had the measurements.

Q. What do you say as to its carrying capacity now as compared with its carrying capacity in 1905?

A. It will carry more water now than in 1905.

Q. I know, but has the canal been made any larger, just because you cleaned it out?

A. Just cleaned it out, it has been made no larger. We didn't clean the ditch in 1905, didn't have the means nor the time. We cleaned a very small per cent.

[230] Q. At the time these measurements were being taken, during the season of 1905, do you know where that gage was? A. Yes, sir, I was there.

Q. Was the canal in shape that summer to carry its full capacity of water? A. It was not.

(Testimony of Jeff H. Lee.)

Q. In 1909 was this canal enlarged in any way?

A. No, sir.

Q. What was done in 1909?

A. The banks were strengthened and the slides taken out at various places.

Q. And a new intake put in at the head of the ditch? A. Yes, sir.

Q. That testified to by Mr. Ellison yesterday?

A. Yes, sir. I was president of the corporation at that time.

Cross-examination.

Q. (Mr. GARRECHT.) What official capacity were you acting in in October, 1905, Mr. Lee?

A. My recollection is I was a trustee. We have five trustees.

Q. You were a member of the board of trustees that voted to sign this agreement with the Government?

A. I don't think the record so shows. I was not at that meeting.

Q. You were a director at that time?

[231] A. My recollection is I was not at that meeting.

Q. You knew about it? A. I knew about it.

Q. And you also knew about the gaging of the river there by observers?

A. I was there and seen that gage, but only knew that Mr. Yearwood was with us and said the Government was measuring water. That is all I know about that gage.

(Testimony of Jeff H. Lee.)

Redirect Examination.

Q. (Mr. GRAVES.) You say you have no knowledge of being present at the trustees meeting when this contract was authorized?

A. No, sir, I was not there.

(Witness excused.)

Mr. GRAVES.—I think that is all.

Mr. GARRECHT.—Counsel for the plaintiff now requests the production of the page of the book of the minute records of the defendant company, heretofore read into the record, and which shows that the figures “3500” were crossed out and “4000” inserted above, for the purpose of letting the court determine whether or not the alteration was made at the time of the meeting or otherwise. In the absence of said page of the record counsel for plaintiff purposes to insist that it was an unauthorized alteration.

[232] Mr. GRAVES.—In response of counsel for the plaintiff, counsel for defendant states, that at the final hearing before the judge who tries the case the record will be produced and submitted to him, but we decline to tear out the sheet and submit it in this record, but we will have it before the court for the purpose of observation when the case is finally submitted.

DEFENDANT CLOSES.

[233] DEFENDANT HAVING CLOSED ITS CASE, THEREUPON PLAINTIFF OFFERED FURTHER TESTIMONY AS FOLLOWS, TO WIT:

Testimony of A. M. Lechman, for Plaintiff (Recalled in Rebuttal).

A. M. LECHMAN, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Lechman, you are familiar with the flow of water at the gage that has been referred to in this record and testimony, are you?

A. I ought to be after 10 years time on it.

Q. You have seen it every day for how many years?

A. For 10 years—this is the 10th year. The last two years my wife has been recording it, but I passed there—have to watch her to see she does it right, see she don't get mixed up.

Q. Is the water exceptionally rough there and turbid?

A. Well, in real high stages of water it will wave up and down a little, because the more water there is in there the swifter it is, it will naturally wave up and down, but as to being a whirlpool there, there is no whirlpool. Naturally wherever water runs against a timber it will waver up and down a little.

Q. Outside of that there are no ripples or eddies?

A. Not that I ever have noticed.

Q. Had there been you would have noticed them, wouldn't you?

A. If there was much of an eddy I would have noticed it, yes.

[234] Cross-examination.

Q. (Mr. GRAVES.) When you were making these readings you were not expected to go up the

(Testimony of A. M. Lechman.)

canal to see how much water was being diverted from the canal above you?

A. I don't know anything about that. I didn't go up the canal.

Q. You didn't know anything about that, you just simply stood there and read the readings?

A. Yes, sir.

Q. Read the gagings? A. Yes.

(Witness excused.)

Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).

[235] PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Above the gaging station at the Lechman ranch, Mr. Taylor, about how much land is under cultivation by means of irrigation from the defendant company's canal?

A. Well, sir, there are, I judge, between 10 and 15 acres, not over that—not over 15 acres.

Q. All told? A. Not over 15 acres.

Cross-examination.

Q. (Mr. GRAVES.) Are you taking into consideration the Ellison place and the Splawn place?

A. Those places have ditches of their own. They don't take water from the West Side ditch. Between the intake to the West Side canal and Lechman's bridge there are no ditches across the railroad track; both those farms are on the other side, I believe, and there are no pumping plants.

Q. Do you mean to say that there is not any water

(Testimony of Paul Taylor.)

delivered by The West Side Irrigating Company to the Ellison and to the Splawn places?

A. I know, if you mean by the Ellison place the L. F. Ellison ranch, that you run to from the road right below Mr. Ellison's—

Q. Yes.

[236] A. I have been there since 1912 and made surveys of that and those ditches, and Ellison irrigated his land then by water that was taken out from a slough.

Redirect Examination.

Q. (Mr. BURR.) Between the head of the ditch and the gage there is no diversion then for more than 10 or 15 acres?

A. No, sir. The West Side people use some sort of measuring-box that they take their water out from, and there are no measuring-boxes above Gordon's flume.

Q. (Mr. GRAVES.) Do you know Mr. Bruton's place?

A. Mr. Bruton?

Q. Mr. W. D. Bruton?

A. No, I don't. I believe though that is a place just above the ditch, is it not?

Q. Yes. The place that used to belong to C. A. Splawn.

A. There is no diversion—no pumping from the ditch and that is what they would have to do to get it on the up-stream side.

(Witness excused.)

Mr. BURR.—That is all.

And thereupon plaintiff and defendant rested and the testimony closed.

[237] United States of America,
Eastern District of Washington,
Southern Division,—ss.

I, Chas. B. Eaton, heretofore and on the 17th day of September, 1913, by this court duly appointed special examiner in the foregoing entitled action, now pending in said court, to take the testimony and proofs of the respective parties thereto and report the same to the court,

DO HEREBY CERTIFY AND REPORT, that being attended by the solicitors for the respective parties, at the Federal Building, in the city of North Yakima, Washington, at the hour of 10 o'clock A. M. the 1st day of July, 1914, I proceeded to take the testimony and proofs of the respective witnesses produced before me by said parties and each of them.

That the foregoing and annexed depositions of the witnesses E. I. Anderson, Frank Herke, A. M. Lechman, Margaret Lechman, Thomas Lechman, William C. Muldrow, T. A. Noble, F. J. Page, Paul Taylor, A. J. Splawn, C. K. Tiffany and J. C. Yearwood, on behalf of plaintiff, and E. I. Anderson, J. M. Burch, Lewis G. Ellison, Carroll B. Graves, Jeff H. Lee, H. G. McNeal, Burt Pease, Mitchell Stevens and W. A. Stevens on behalf of defendant, were taken before me, at North Yakima and Ellensburg, Washington, within said District, on the 1st and 2d days of July, 1914, and the 22d and 23d days of March, 1915.

That each of said witnesses, before examination, was by me cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, and then

orally examined by the solicitors for the respective parties; that said testimony and proofs and depositions were by me reduced to writing, in shorthand, in the presence of the witness testifying [238] and the solicitors for the respective parties, and thereafter transcribed by me and under my direction; that the annexed transcript, depositions and record, consisting of 236 typewritten pages, is a full, accurate and complete transcript of my shorthand notes, taken as aforesaid, and contains and embraces all the testimony, depositions, proofs and proceedings had before me in said cause as such special examiner, and contains and embraces all the testimony and proofs offered or produced before me in said cause, and all objections to the admission of testimony, offers to prove, motions to strike and stipulations and admissions.

That the reading of the depositions to or by the respective witnesses, and their signatures thereto, were by the parties hereto, by their respective solicitors, expressly waived.

That during the taking of said depositions and proofs exhibits were offered in evidence by plaintiff as follows: "A" to "P," both inclusive, and by defendant "1" to "4," both inclusive, which exhibits, properly identified and marked, are returned and filed herewith.

That I am not related by blood or marriage to either of the parties hereto, am not attorney or counselor for either of them, and am not interested, directly or indirectly, in the result of this action nor in the subject matter thereof.

Dated, North Yakima, Washington, June 19, 1915.

Respectfully submitted,

(Signed) CHAS. B. EATON,

Special Examiner.

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Jul. 10, 1915.
Wm. H. Hare, Clerk. (Sgd.) Edward E. Cleaver,
Deputy.

[Endorsed]: No. 2866. United States Circuit
Court of Appeals for the Ninth Circuit. The West
Side Irrigating Company, a Corporation, Appellant,
vs. The United States of America, Appellee. Tran-
script of Record. Upon Appeal from the United
States District Court for the Eastern District of
Washington, Southern Division.

Filed October 9, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.